University of Alberta

Exploring Identity and Citizenship:
Aboriginal Women, Bill C-31 and the Sawridge Case

by

Joyce Audry Green ©

A thesis submitted to the
Faculty of Graduate Studies and Research
in partial fulfillment of the requirements
for the degree of Doctor of Philosophy.

Department of Political Science

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Joyce Green

2409 - 107 Street
Edmonton, Alberta
T6J 5N4

August 29, 1997

UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled: **Exploring Identity and Citizenship: Aboriginal Women, Bill C-31 and the** Sawridge **Case** submitted by **Joyce Audry Green** in partial fulfillment of the requirements for the degree of DOCTOR OF PHILOSOPHY.

Dr. L. Trimble (Supervisor)

Fred Judson

Dr. F. Judson, Committee Chair/Examiner

Gurston Dacks

Dr. G. Dacks

Judith A. Garber

Dr. J. Garber

Professor D. Schneiderman, Executive Director, Centre for Constitutional Law, Faculty of Law

Sandra Burt

Dr. S. Burt, Dept. of Political Science University of Waterloo

May 22, 1997

Date

DEDICATION

This work was inspired by the stories of many women spanning many decades, who found their lives warped by the forces of racism and sexism in a society formed by and for colonialism. It illuminates only a small portion of their experience, but that experience illuminates several processes that continue to impair the evolution of the Canadian state and of full citizenship in it. This dissertation is my contribution to naming and challenging the destructive forces that impair citizenship, and with it, the integrity of Project Canada.

Abstract

Exploring Identity and Citizenship:
Aboriginal Women, Bill C-31 and the Sawridge Case

This dissertation examines the problem of contemporary citizenship as the way in which people understand themselves to be citizens, not simply as autonomous rights-bearing individuals in relation to the modern state but also, and perhaps especially, as members of communities, of societies. I begin by locating aboriginal nations in the colonial state and investigating the assumptions that are encoded in law, politics and culture. Next, I review the development of the Indian Acts and especially their impact on women. I turn to the particular arguments about the constitutionality of the Indian Act advanced in the Sawridge case. Then, I review the liberal democratic picture of universal citizenship and examine how citizenship is differentially constructed and experienced. I consider the claims of indigenous nations to control citizenship in a context of decolonisation, while continuing to endure the superordinate structure of the state. I interrogate questions of racism and sexism on the part of both colonial and aboriginal governments, and consider the legitimacy of rights discourse and its applicability across cultures and in opposition to traditions. Finally I examine in detail the problems facing a segment of the Canadian population whose citizenship has been constrained; Indian women who have, by colonial history, colonial legislation, and by both colonial and indigenous patriarchy, been involuntarily exited from their communities of origin, and how this reality and their resistance to it raises

questions about what citizenship is relative to Indian government in Canada, and relative to indigenous people as Canadians.

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Exploring Identity and Citizenship: Aboriginal Women, Bill C-31 and the Sawridge Case

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Introduction:
Surveying the Terrain

In 1982 Canada came of age by patriating a piece of British legislation defining Canadian constitutional jurisdictions and institutions so that amendment of the constitution was in Canadian hands. A Charter of Rights and Freedoms was added at this time, defining the rights that Canadian citizens have in relation to the state, and identifying aboriginal peoples as holding unspecified aboriginal and treaty rights in relation to the state. Governments and aboriginal organisations alike have focused on 'self' government as the pre-eminent of these rights. These constitutional initiatives represent Canada's evolution from colonial to state status. They do not, however, reveal or remedy Canada's own colonial relationship to aboriginal peoples. They do not in any practical fashion democratise political power. They do not reveal or remedy the practices that exclude the vast majority of women and of racialised others from meaningful participation in political and economic life.

This dissertation is not about the constitution. But the constitution is an important reference for my argument, which suggests that power is sustained through popular culture without much critique simply because its very existence is deemed to legitimate it. Society, for the most part, takes as given the way things are. Those who advance radical critiques of the way things are bear the onus of legitimating their critique of what most accept as common sense. And yet common sense can be popular misconception, mythology, or ideology that serves some at the expense of others.

This dissertation asks the reader to revisit certain academically and politically popular assumptions about the origin of the Canadian state, and the interests it has served so well to date, in order to see those who have been oppressed in this process. Then, the reader is asked to interrogate new assumptions about partial remedies: that is, popular assumptions about the ability of 'self'- government to ameliorate the colonial legacy. In all of this, the reader is encouraged to adopt "the feminist method of looking to the bottom, of asking who is buried beneath the social heap, why, and what can be done about it".[1] In Canada, to be female and aboriginal is to be disempowered by the state. Too often, it is also a good predictor of disempowerment by band governments. Appeals to the state for rights-based remedies results in responses to the effect that state-designed 'self' government will ameliorate the problem (a response which assumes aboriginal women have no unmediated citizenship claim against the state) while these same appeals often result in strong criticism from bands and aboriginal lobby organisations to the effect that dissident women are betraying the cause of aboriginal liberation by invoking colonial, or western, or white, or feminist analyses and remedies. Appeals to band governments and aboriginal lobby organisations are liable to attract responses invoking tradition as legitimation of the status quo, or of strategic considerations that generally place an agendum of explicitly women's priorities as a low priority. Radicalised, marginalised, and exited aboriginal women have little support for their critiques of state and band government practices which systematically and negatively affect women as women. Their experience has a great deal of light to shed on the racist, sexist practices of the state, the incorporation of these same practices by band governments, and the limitations of Canadian democratic practices for responding to oppression of those who are politically inconsequential by definition.

This dissertation "looks to the bottom" to map the issues and explore the concepts that constitute the terrain being contested by and for 'Indian' women, both in terms of rights discourse, decolonisation and 'self' government. It does so in order to explore the unfolding parameters of contemporary citizenship based on rights, social practices and identity, within the Canadian context framed by colonialism and structured by racism and sexism. Indian women's political agency lies at the intersection of two historical and continuing problems, imperialism (mutating through racist colonialism) and sexism. It is through colonial history and its contemporary inherited social relations, and the historical and contemporary social structures that encode gender discrimination, that this problem must be viewed. Indian women's lives are the terrain on which battles are fought over the relative importance of colonial oppression versus sexism; of individual versus collective rights; of the im/mutability of aboriginal tradition; of the right of self-determination[2] in a context inalterably changed by colonial factors; and of the emancipatory potential of actualised citizenship.

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[1] Donna Greschner, "Commentary", After Meech Lake: Lessons for the Future, David Smith, Peter MacKinnon and John Courtney, eds., Fifth House Publishers, Saskatoon, Saskatchewan, 1991, at 223.

The state of Canada, the Assembly of First Nations, and bands (the quasi-political entities which themselves are either recognised by or are creations of the colonial Indian Act, and are also predominantly male-occupied power structures) negotiate the potential or actual location of Indian women, without the participation of the affected women qua women. These negotiations determine 'status' and its concomitant package of rights[3] and entitlements to program benefits,[4] reserve residency and political and social participation on reserves. For a majority of the population under discussion, the reserve land base also constitutes the locus of 'community', within the meaning of Article 27 of the International Covenant on Civil and Political Rights.[5] Increasingly bands insist on their right to determine membership, or citizenship, as an incident of governance, and some do so in a manner exclusionary of women and their children based on the pre-1985 Indian Act section 12-1-b, or on the origin of the spouse of women, or on the residency of individuals.

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[2] Article 1 of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reads: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." The Draft Declaration on the Rights of Indigenous Peoples (provisional) states in article 3: "Indigenous peoples have the right to self-determination." UN Doc.E/CN.4/Sub.2/1994/2/Add.1, April 20, 1994.

[3] Pursuant to the Charter of Rights and Freedoms, sections 25 and 35, and to all other Charter rights as a consequence of Canadian citizenship, which is itself not unproblematic for some aboriginal people.

[4] Available to the population designated as 'status Indians' via the Indian Act for the purpose of Department of Indian and Northern Affairs programs such as limited funding for post-secondary education, and on occasion Secretary of State programs designated for aboriginal persons.

[5] Article 27 reads: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Canada has already been found in breach of this provision in the case Re Sandra Lovelace, United Nations Human Rights Commission 6-50 M 215-51 CANA, in which Lovelace contested her exclusion from her reserve community because of her marriage to a non-native man.

To explore the contemporary political location of 'Indian' women, we need to identify the central issues framing the politics of governance, Canadian and indigenous citizenship, and fundamental human and inherent aboriginal rights. These issues begin with colonialism, and include racism, sexism, and the intersection of these in a formula now packaged as 'tradition' but which more closely approximates what Edward Said calls 'nativism'.[6]

There appears to be a dilemma comprised of conflicting rights claims and claims of subordination as between some aboriginal women and all aboriginal nations. The rights abuses claimed by the former result from colonial imposition and Canadian racism and sexism, but also from the internalisation of colonial practices by aboriginal people and practiced by aboriginal organisations and administrations now, and because of sexist practices indigenous to aboriginal cultures. The rights abuses claimed by the latter are consequent to colonialism and racism, and also, for women, because of Canadian practices of sexism. Some indigenous women allege rights violations by indigenous agents (including governments and bureaucrats) and demand structural, procedural and attitudinal changes from them. These women also invoke rights protection by the Canadian state against abuses by indigenous agents, most often band councils. These rights are claimed by individuals, both as human rights of individuals and as identity-related rights impaired by exclusion from the relevant socio-political unit. They are affected by the politics of various indigenous and state governments. The rights abuses invoked by indigenous nations and aboriginal [illegible]ganisations are consequent to state behaviour, and include rights pre-existing the state [illegible]rent rights) as well as in relation to the state (constitutional aboriginal and treaty rights and human rights). These rights are most commonly articulated as practices forming the right of self-determination, a right of peoples, enjoyed collectively, not individually.

Problematically, the rights claims of some women are constructed as undermining the rights claims, embodied in practices, of those aboriginal governments on behalf of the relevant socio-political unit -- the collectivity. Further, the rights claims of these women are sometimes dismissed as untraditional and, by extension, as deleterious to indigenous liberation. Aboriginal women's human rights, then, are constructed by political discourse as inauthentic; that is, as unaboriginal and contrary to tradition, as well as counter-productive to political and cultural liberation from colonial domination.

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[6] Edward Said, Culture and Imperialism, Vintage Books, Random House, New York, 1994, at 228-29, 275, and generally.

Rights are the foundation of citizenship. They delimit the parameters of the citizen's relationship with the polity and with other citizens. For the aboriginal women in question, their capacity to be fully engaged citizens in either or both the dominant society and their own communities is delimited by the forces of colonialism, racism and sexism. Nor are appeals to either community particularly productive: both reject, minimise, or ignore their claims and so refuse to welcome them into the family of full citizens.

As a practical example of these theoretical questions I explore the problems posed by existing and potential conflicts between indigenous governments and the Charter guarantees of rights and freedoms, by examining the case of Twinn et. al (Sawridge Band v. Canada [1995] (FC-Trial), now under appeal to the Federal Court of Appeal. (It is expected to proceed to the Supreme Court of Canada after the FCA ruling.) Sawridge is an excellent demonstration of the conflicting arguments, the conflation of terms, and the participation of the both colonial and patriarchal state with the primarily male band councils in the subordination of indigenous women. It also reveals the instrumental and demonstrably illegitimate use of 'tradition' as an instrument of domination. Finally, it shows the irrelevance of these women to both the Crown (on behalf of the state) and to the bands. The issues of power, control, economic considerations, and competing versions and interpretations of history are played out in Sawridge by mostly male lawyers acting for male-dominated band councils, seeking a declaration of their inherent right to determine band membership as they see fit, and without regard to the Charter of Rights and Freedoms. They are answered by male lawyers acting for the patriarchal state, which seeks to refute this claim to control 'citizenship' while ignoring the state's colonial and sexist practices which create precisely the problem under debate. The legal questions are played out on the terrain of these women's lives, without their participation and without acknowledging their centrality to the case.

This dissertation assumes that the definitions and processes of colonialism and patriarchy are non-controversial. For greater clarity, I outline their parameters below. Then, I briefly trace the debate about the significance of tradition, and the parameters of justice in the context of lives lived at the nexus of colonialism, racism and sexism. Finally, I outline the chapters' individual contributions to this thesis.

The oppression of colonialism is a relentless and pervasive reality for most colonised people. It exists in the invisibility of the colonized in cultural icons, in academic canons, in political structures, processes, discourses and objectives. It exists in the overwhelming pressures which coerce the colonised in myriad ways to conform to the colonial norms.

Colonialism is an exploitative relationship designed for the economic benefit of the colonisers at the expense of the best interests of the colonised, and regardless of the concurrence of the colonised.[7] It is justified through the use of instrumental racism, which constructs the colonised as 'other' than the virtues and norms which the coloniser attributes to itself.[8] Therefore, the colonised either deserves to be overwhelmed, or is benefitting from the arrangement in obtaining the fruits of social, religious, and other measures of modernity and enlightenment. This claim is perpetuated through mythologised history and by judicial and political institutions that proclaim and defend the coloniser's interests and become part

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Albert Memmi, The Colonizer and the Colonized (Trans. Howard Greenfeld), Beacon Press, Boston, 1965:3; and James Blaut, The Colonizer's Model of the World: Diffusionism and Eurocentric History, The Guilford Press, New York, 1993 (hereafter cited as The Colonizer's Model of the World).

Edward Said, Culture and Imperialism, Vintage Books, Random House, New York, 1994, at 9.

of state ideology.[9]

Various definitions of patriarchy are offered by the literature. Heidi Hartmann defines it as "a set of social relations between men, which have a material base, and which, though hierarchical, establish or create interdependence and solidarity among men that enable them to dominate women."[10] Jill Vickers writes that it "describes societies in which the balance of power and authority between men and women favours men".[11] Melanie Randall's definition is that "it stands for a far-reaching social subordination or women".[12] Mary Daly refers to "the structured evil of patriarchy" that "is the perpetual poorhouse in which women are ... afflicted with poverty of spirit, imagination, intellect, passion, physical vigor, as well as economic poverty".[13] Juliet Mitchell calls it "the sexual politics whereby men establish their power and maintain control" and according to Kate Millett, it is an "omnipresent system of male domination and female subjugation ... achieved through socializing, perpetrated through ideological means, and maintained by institutional methods"[14] What all of these definitions have in common is the recognition of a male preferential hierarchy resting on women's subordination.

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[9] James Blaut, The Colonizer's Model of the World: Diffusionism and Eurocentric History, The Guilford Press, New York, 1993 (hereafter cited as The Colonizer's Model of the World); and The National Question: Decolonising the Theory of Nationalism, Zed Books, London, 1987.

[10] Heidi Hartmann, "The Unhappy Marriage of Marxism and Feminism", Feminist Philosophies, Prentice-Hall, 1992, at 345.

[11] Jill McCalla Vickers, "At His Mother's Knee", Women and Men: Interdisciplinary Readings on Gender (G.H. Nemiroff, Ed.), Fitzhenry and Whiteside, 1990, at 480.

[12] Melanie Randall, "Feminism and the State: Questions for Theory and Practice", Resources for Feminist Research, Vol.17, No.3, 1987, at 20.

[13] Mary Daly, Beyond God the Father: Toward a Philosophy of Women's Liberation. Beacon Press, Boston, 1973, at xxviii.

The oppression of patriarchy lies in the normativeness and coerciveness of political, legal, social and economic systems reflecting and requiring conformity to male dominance and female subordination.[15] Women and men are disciplined to conform in myriad ways, though it is men who have the biggest stake in the maintenance of patriarchy.

Insofar as women now or in the past in any culture are politically, economically, or socially subordinate to men, that society can be characterised as male dominant or patriarchal: Canada is patriarchal.[16] And, despite the historical diversity of indigenous nations, despite the historical valuation of women by many (but not all) indigenous nations, the patriarchy has now become normative for the vast majority. There are reasons for this: the colonial institutions enforced generations of indigenous youth to incorporate colonial norms, one of the most fundamental of which is patriarchy. But that reality does not absolve indigenous governments from the contemporary practice of patriarchy, nor does it exempt these practices from internal and external critique on the basis of rights abuses.

Patriarchal norms are not exclusive to European-derivative colonial societies, but it is the consideration of how the European variant, flavoured with Judeo-Christian theological, liberal philosophical and capitalist economic doctrines, have been transplanted that is of interest here. The consequence is the oppression of indigenous women, not only by colonial history and contemporary politics, but by the patriarchy; not only by the patriarchy manifested in colonial society, but by this colonial patriarchy incorporated into indigenous societies, sometimes syncretised with indigenous cultural traditions practiced by indigenous peoples, and implicit in indigenous politics internally and in contestation with the colonial state.[17] The subordination of indigenous women is presumed, where it is confronted at all, to be justifiable because of its instrumental strategic use in confronting colonial agents or because it resonates with 'tradition'.

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[14] Juliet Mitchell, Women's Estate, Vintage Books, Random House, New York, 1971 at 65.

[15] See, for example, Catherine MacKinnon, Towards a Feminist Theory of the State, Harvard University Press, 1989, at 160-62.

[16] See, for example, Lorraine Code, "Feminist Theory", Changing Patterns: Women in Canada (2nd), Sandra Burt, Lorraine Code and Lindsey Dorney, eds., (Toronto: McClelland & Stewart) 1993, at 19 -57.

This intersecting oppression forms a complex web that constrains a segment of indigenous women from contesting patriarchal oppression within indigenous communities and in the dominant Canadian community, that inhibits confronting race oppression in both communities, and that privileges colonial construction of indigenous reality. The political stance of these women is informed by their lived experience: it is an example of the personal made political. Without overgeneralising the shared analysis, it is fair to say that living with the reality of internalised colonialism and the various manifestations of decades or centuries of colonial oppression has led these indigenous women to struggle with self-definition, with issues of solidarity with indigenous peoples and with all women, and with resistance to colonialism and to sexism.

How do indigenous women, who find themselves marginalised by political stances of their communities and who believe this is an injustice that violates their fundamental human rights, seek justice from a community whose leaders define them as non-community members, and therefore voiceless? Where may such women raise their complaint? To what authority may they appeal? And where does legitimate authority lie to settle disputes that place rights claims in opposition to each other? Indigenous nations claim the right to determine their members as a fundamental component of governance, a right arguably guaranteed in the constitution, along with the right to be free from sex and other forms of government-sponsored discrimination. Are indigenous governments bound to adhere to the same code of conduct that the constitution demands of provincial and federal governments with respect to Canadians? Or is that code of conduct so thoroughly a product of western European liberalism that it is a form of cultural imperialism to require its application to indigenous governments?[18]

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[17] See, for example, Emma LaRocque, "Relationship of Gender to Issues of Self-Government", unpublished paper, Department of Native Studies, University of Manitoba, 1996.

Patriarchy is disabling for women's empowerment, and a false pan-Canadian universality is disabling for all women, for all indigenous peoples, and for many others. Yet, there is no consensus among indigenous women on the existence of or the nature of the patriarchy. Indeed, there is a powerful resistence to what is seen as yet another dominant political expression -- feminism -- infringing on indigenous reality.[19] Some women argue that solidarity among indigenous peoples is essential in order to resist the continual threat and oppression of colonial Canada; some argue that indigenous societies were not and are not patriarchal; some argue for priorising the 'healing' of communities rather than focusing on healing women victimised by men; some argue that feminism is anti-family and un-indigenous. In this debate, indigenous feminists are frequently targetted as dupes of the 'white' feminist movement, and as race traitors, advancing their own narrow agenda at the expense of indigenous solidarity.[20]

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[18] This argument is put forward by Mary Ellen Turpel. "The rights paradigm, whether it be articulated in terms of legal or political rights, or through civil conceptions of a consolidated property right, is simply a historically and culturally specific mechanism for the resolution of disputes and the allocation of resources that is different from the procedures used in any of the various Aboriginal cultures." Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences", Canadian Perspectives on Legal Theory (Richard F. Devlin, ed.), Emond Montgomery Publications Limited, Toronto, 1991, at 518.

'Tradition' has been used to justify and to exculpate cultural practices that are inconsistent with liberal rights guarantees. The history of this is the history of colonial occupation and assimilation policies, whose objective was the obliteration of indigenous practices. Invoking tradition is a powerful means of resisting colonialism. It is a reclaiming of socio-political structures and processes that nourished nations for untold generations. As Gerald Alfred argues, identity, structure and process for indigenous nations are encoded in "traditional forms of social organization" -- within traditions.[21] Tradition invokes authenticity of being despite the continuing occupation of colonial society and its powerful and seductive culture.

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[19] See, for example, Joyce Green, "Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government", Constitutional Forum, Vol.4, No.4, 1993, at 111-112, and 118-119; and Sally Weaver, "First Nations Women and Government Policy, 1970-92: Discrimination and Conflict", Changing Patterns: Women in Canada (2nd), (Sandra Burt, Lorraine Code, and Lindsay Dorney, eds.), McClelland and Stewart Inc., Toronto, 1993, at 96-97.

[20] Sally Weaver, ibid at 107.

[21] Gerald R. Alfred, Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism, Oxford University Press, 1995, at 12.

It also creates insularity and a historically defined set of validations. Problematically, this suggests change is difficult or even illegitimate, and focuses attention on history without historical contingency. The consequent hostility to change and the fetishism of tradition can lead to rigidity and irrelevance.

Invoking 'tradition' is insufficient to insulate any society's practices from a critique, but especially from auto-critiques suggesting these oppressions infringe upon the rights of its members as understood by those members. The retreat to essentialism does not serve the project of liberation from either colonialism or patriarchy. As Harold Cardinal wrote, "(t)he past and the present are important, but basically we have to look to the future."[22]

Indeed, through the fixation on adhering to a traditional standard that is exemplified by past practices and contexts, political movements stray into what Edward Said calls 'nativism'. The concept is important enough to warrent elaboration here. 'Nativism' "has often led to compelling but demogogic assertions about a native past, narrative or actuality that stands free from worldly time itself."[23] It is a stance which is reactive to the colonial relationship and is often so reactive that it is at least partially an internalisation of the stereotypes of the coloniser. As Said warns, "to accept nativism is to accept the consequences of imperialism, the racial, religious, and political divisions [and he should have included gender divisions] imposed by imperialism itself."[24] It can lead to "the emotional self-indulgence of celebrating one's own identity" which denies the possibilities of non-coercive inclusive universalism and multiple identities, as well as leading to a host of debilitating and limiting chauvinisms.[25]

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[22] Harold Cardinal, The Rebirth of Canada's Indians, Hurtig Publishers, Edmonton, 1977, at 7-8.

[23] Edward Said, Culture and Imperialism, Vintage Books, Random House, New York, 1993, at 228.

Arguably, the strategic use of the rights of some Indian women by male-dominated Indian organisations demonstrates a diagnosis of 'debilitating and limiting chauvenisms'. Harold Cardinal argues that the federal government's intent in supporting the legal challenge of Jeanette Lavelle and Yvonne Corbiere's case, which challenged sexist provisions of the Indian Act, was to eliminate the Indian Act itself and therefore the legal base of treaties.[26] But this argument cannot hold now after the 1982 Constitution's acknowledgement of "existing aboriginal and treaty rights". Nor was it a good argument then, for while the Indian Act acknowledged the treaties, it was not the legal base of treaties. Interestingly, though, the sacrifice of Indian women's rights to the allegedly greater good of Indian rights through the Indian Act at least never pretended to be an expression of tradition. That is a later argument, by those who have forgotten the origins of the Act or who conflate them with 'tradition'.

Antonio Gramsci insisted that reflective and historically grounded self-knowledge is essential for 'critical elaboration'.[27] It is when movements lose sight of the continuous historical record and the relation of tradition to historical events that tradition, the authentic social code suggested by Alfred, becomes an ossified straightjacket restricting evolution and innovation, and justifying oppression.

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[24] Ibid.

[25] Ibid at 229.

[26] Harold Cardinal, The Rebirth of Canada's Indians, Hurtig Publishers, Edmonton, 1977, at 109-111.

The oppressive potential of especially state-invoked tradition was not lost on state and non-governmental organisation participants at the Beijing Conference on Women. The Platform for Action produced by Conference asserts that states cannot invoke custom, tradition, or religious fiat to avoid their obligation to uphold women's rights (as a gender-specific articulation of human rights). The Platform is the consequence of high-level political negotiations; the United Nations recognises 184 states, with hosts of cultural and religious contexts, to say nothing of economic distinctions. The consensus on the obligation of states to affirm women's rights before attending to these cultural and religious practices as they relate to women is a testament to the emergence of the preconditions for equal valuation of women.[28] At the historical moment when indigenous nations seek quasi-state recognition, or exemption from state constraints and obligations as they pertain to gender equality, it is especially important to remember that the global community is approaching consensus both on the right of peoples to self-determination and on the unconditional, inalienable human rights of women.

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[27] "The starting-point of critical elaboration is the consciousness of what one really is, and as 'knowing thyself' as a product of the historical process to date". From the Italian text of The Prison Notebooks, cited by Edward Said, Orientalism, Random House, New York, 1979, at 25.

[28] Information on the Beijing Conference and Canada's role in it from the Hon. Audrey McLaughlin, MP, Yukon, "Women's Report", House of Commons, December 1995.

As states move to acknowledge and remedy the structural problems caused by sex discrimination, and to priorise eradication of discrimination over preservation of tradition, it would be perverse for indigenous nations to move in the opposite direction.

In approaching the material in this dissertation, I was guided by the metaphor of photographic options. Here, the subject material is examined and re-examined through different analytical lenses. In photography, the choice of lens length, of film and shutter speed and of aperture size determines what subject material will be prominent in the photograph. Repeated photographs of the same subject, varied by lens, shutter speed and aperture, reveal different visual phenomena of the same subject. In this dissertation, repeated examination of the same material relating to indigenous government, colonial and gender oppression and rights discourse reveals different contours of the same social phenomena. The disparity and compatibility of these contours illuminates the question of the location of indigenous nations in settler states; as well as the rights of individuals whose primary identity is derived from those nations.

Chapter One, "Contextualising History", considers the historical and contemporary politics shaping the subordination of contemporary indigenous nations within the settler state of Canada, and the implications for the state's policies toward indigenous nations. It also examines the key terms used in political and constitutional discourse about aboriginal peoples and aboriginal women, and the assumptions encoded in language.

Chapter Two, "Background and Foreground", examines the origin and evolution of the notion of 'status' in the federal Indian Acts, the 1985 C-31 amendments providing for the reinstatement of women who had lost status because of marriage and for the acquisition of status by their children, and the relationship of band control of membership, also conferred by C-31, to issues of self-government and of rights claims against band governments. Here, the notion of 'self' government is examined to show how it amounts to state delegation of administrative powers to band governments, rather than being a decolonising initiative characterised by state withdrawal from indigenous lands or political practices.

Chapter Three, "Arguing the Issues", examines the plaintiff, defendant and intervenor arguments in Sawridge Band v. Canada [1995] (FC-Trial), as well as the court's judgement. In this chapter I rely on the factums, the verbatim court transcript, the judicial decision, and on the many papers and files prepared as exhibits, evidence, research, exchanges between lawyers, and related papers. In the case, the plaintiffs contend that C-31 amendments to the Indian Act amount to a violation of their constitutional aboriginal and treaty rights under Section 35 of the Constitution Act 1982, as well infringing on their constitutional right to freedom of association under Section 2 of the Charter. They argue that their cultural traditions are consistent with the loss of status visited on women who 'married out' prior to 1985, and as an aboriginal tradition that practice must be immune to the Charter guarantees of sexual equality.

Chapter Four, "Negotiating Rights and Traditions", examines claims to self-determination by indigenous peoples, and the claims of some indigenous peoples to rights which may conflict with aboriginal traditions. This chapter also interogates the way in which traditions are selectively invoked to legitimate oppression, and challenges the notion that tradition is axiomatically defensible. It argues that rights are not inherently alien concepts to indigenous thought, that traditions are evolutionary social practices which are not beyond contestation, and that contemporary notions of rights and social justice are both invoked by and bind indigenous nations.

Chapter Five, "Intersectionality and Authenticity", examines the competing and conflicting identity locations, subject positions, and citizenship of aboriginal women who have been involuntarily exited from their communities of origin. In this chapter I examine the problem of contemporary citizenship as the way in which people understand themselves to be citizens, not simply as autonomous rights-bearing individuals in relation to the modern state but also, and perhaps especially, as members of communities, of societies. I consider the rights claims of indigenous nations to control citizenship in a context of decolonisation, while continuing to endure the superordinate structure of the state. I bring into this debate the rights claims of marginalised members of indigenous communities, especially Indian women who have, by colonial history and legislation, and by both colonial and indigenous patriarchy, been involuntarily exited from their communities of origin. This picture suggests these women minimally live at the intersection of racism and sexism. However, they also have a firm grip on their identities as simultaneously women and aboriginal and cannot privilege one over the other. These women have the potential to demonstrate a profoundly complex and important identity, practiced as citizenship in both indigenous communities and mainstream Canada. Their ability to do this, and the political ability to accept them, presages Canada's ability to find workable citizenship formulae for its diverse populations. In short, their lives will suggest patterns of liberation for all of us.

The Conclusion brings together the composite picture taken through these various lenses to show the relationship between identity, decolonisation, rights, and citizenship, to produce a more complete image of the location of aboriginal women in contemporary Canada.

Chapter One

The Practices of Colonialism, Racism, and Sexism: The Legacy to Indigenous and Settler Canadians

Introduction

In this chapter I argue that Canada is an evolving colonial entity, created by colonial interests for the express purpose of extending and consolidating those interests at the direct expense of the indigenous peoples and their contemporary descendants. Canada has established racist, exploitative and coercive colonial relationships, interpreted by the dominant, who styles the dominated as Other. These relationships are perpetuated by mythologised history and judicial and political institutions that proclaim and defend this mythology-cloaked un-hyphenated colonialism.

I begin by examining the foundations of colonial mythmaking, and then use the example of the perpetual federal policy of extinguishment of aboriginal and treaty rights to show the continuing operation of the processes alleged above. I argue that Canada can not escape its colonial past through the passage of time. Only explicit acknowledgement of its origins and the constitutional and political consequences that will flow from acknowledging such responsibility have the potential to lead to a "detente with history"[1] and to a genuinely postcolonial future. And only through the creation of a postcolonial relationship can there be any unifying Canadian citizenship for indigenous peoples.

All historical beginnings are contingent and somewhat arbitrary. Here. I take Canada in its contemporary form to 'begin' in 1867, though of course its pre-existence as provinces and colonies and through the activities of imperially-mandated enterprises is precisely what locates it as an imperial and colonial endeavour then and now.

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[1] Vine Deloria, "Forword", The Fourth World (George Manuel and Michael Posluns), Collier Macmillan Canada, 1974, at xi. Hereafter The Fourth World.

In denying responsibility for its consequences, the state is unable to adequately engage with aboriginal resistence, manifested in contestation of state legitimacy and in a political search for constitutional, policy and physical accommodation by the colonial state of its subordinated and unwilling hosts. Because the continuity of this phenomenon and its consequences are being considered, the concurrent history of aboriginal resistence is not the primary focus of this chapter.

While I use the term 'colonialism' throughout, I accept the ontological relation of colonialism to imperialism, and ground both in the emergence and expansion of the global phase of capitalism.[2] Arguments are premised on the view (following, for example, Edward Said[3] and James Blaut[4]) that imperialism and colonialism are economic in impulse, but are also culturally embedded processes which create and also suppress knowledge. In Said's words, "Both are supported and perhaps even impelled by impressive ideological formations that include notions that certain territories and people require and beseech domination, as well as forms of knowledge affiliated with domination ...".[5] In this sense 'H'istory as the dominant narrative is being contested here, while at the same time the ideological and bureaucratic practices originating in racism are foregrounded.[6]

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[2] Edward Said defines imperialism as "the practice, the theory, and the attitudes of a dominating metropolitan centre ruling a distant territory; 'colonialism', which is almost always a consequence of imperialism, is the implanting of settlements on distant territory." Culture and Imperialism, Vintage Books, Random House, New York, 1994, at 9.

[3] Orientalism, Random House, New York, 1979; and Culture and Imperialism, Vintage Books, Random House, New York, 1994.

[4] The Colonizer's Model of the World: Diffusionism and Eurocentric History, The Guilford Press, New York, 1993 (hereafter cited as The Colonizer's Model of the World); and The National Question: Decolonising the Theory of Nationalism, Zed Books, London, 1987.

Mythmaking Our History and Future

History, the apocryphal saying goes, is written by the victors. We come to know ourselves through the selective collective construction of significant events that form a unifying mythology -- unifying for those who are included; alienating for those who are excluded. The events that are designated memorable and the ways in which they are interpreted through the lens of 'H'istory shape our collective consciousness. In Canada, 'conventional' history (history which underpins our social and political conventions) has distorted our collective consciousness, overstating certain contributions while making others invisible. However, the 'H'istorical record is seldom acknowledged to be contingent and subjective.

Mythmaking satisfies those "who do not know, or choose not to know"[7] the fuller historical record, but it does not provide the foundation of information on which to build policy responses to contemporary crises rooted in the colonial past. These policies, crafted to meet colonial but not indigenous realities, have ranged from pernicious to inadequate and inappropriate. Their failure and the problems they have created contribute to the contemporary Canadian angst[8] about the future shape and complexion of the nation state, as those raised on myths struggle to understand both indigenous alienation and claims of aboriginal and treaty rights.

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[5] Culture and Imperialism, Random House, New York, 1994, at 9.

[6] As Michael Asch puts it, "Canadian state ideology masks assumptions about our occupation of Canada that have racist and colonial overtones". "Aboriginal Self-Government and the Construction of Canadian Constitutional Identity", Alberta Law Review, Vol. XXX, No.2, 1992, at 470. Hereafter "Aboriginal-Self-Government and the Construction of Canadian Constitutional Identity".

[7] Barbara Ransby, "Columbus and the making of historical myth", Race & Class 33;3, 1992, at 82.

Albert Memmi identifies the origins of this colonial angst. The original and continuing economic motives for colonial undertakings are primary,[9] and colonial immigrants embark(ed) on the dangers and mysteries of a 'new' life because of a desire for profit which could not be expected by enterprise at 'home'. This profit is disproportionately large because "it is wrested from others", and the result is the illegitimate privilege of the usurper.[10] However relative this privilege, it is nonetheless consistent in accruing to the European immigrant qua European at the expense of the colonised 'native',[11] creating an inequitable relationship grounded in race privilege. The colonial administration-government creates bureaucratic, legislative and educative filters to ensure recruitment of its own and enforcement of its own rules to guarantee its interests. The privileged position of colonisers relative to 'natives', together with the rationales justifying it, create a divide between the populations that is, in these circumstances, untranscendable. The 'two solitudes' are those of every coloniser and colonised set of societies.

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[8] For example, the 'crisis of community', the tensions between regional and ethnonational collectivities posited by Michael Asch, "Aboriginal Self-Government and the Construction of Canadian Constitutional Identity", Alberta Law Review, Vol. XXX, No.2, 1992.

[9] Albert Memmi, The Colonizer and the Colonized (Trans. Howard Greenfeld), Beacon Press, Boston, 1965:3. Hereafter The Colonizer and the Colonized. See, also, James Blaut, "Enterprise in the Americas was from the start a matter of capital accumulation: of profit." The Colonizer's Model of the World, 1993, at 187.

[10] Ibid, 7-9.

[11] Ibid, 10-11.

Colonialism depends on a constructed instrumental racism for its moral legitimation. Incommensurability between coloniser and colonised is invoked to demonstrate the superior nature of the coloniser and the inevitability of the new order. Memmi writes:

> Colonial racism is built from three major ideological components: one, the gulf between the culture of the colonist and the colonized; two, the exploitation of these differences for the benefit of the colonialist; three, the use of these supposed differences as standards of absolute fact. ... Racism appears then, not as an incidental detail, but as a consubstantial part of colonialism.[12](emphasis mine)

Justifications are created: the 'natives' are lazy, simple, wild, inept, lascivious, or immoral.[13] Denigration of culture, politics, spirituality, and capacity for moral and intellectual engagement is used to construct the Other in such as way as to legitimise the Coloniser's actions. That is, they are the repository of vice and fault, contrasted with the rectitude and competence of colonial society, in a dualistic construction of 'native' as Other. L.F.S. Upton captures how this was cast in what would become Canada: "(It was thought that Indian) inferiority was cultural and could be remedied by training in civilized ways."[14] Through the process that Blaut calls "shaping knowledge into theories ... useful for colonialism"[15] the federal government adopted policy objectives of protection, civilization, and assimilation, pursued in the containment fields of reserves and bureaucratised through the churches and branches of the civil service. All this was sustained by ideological formations supporting the guided development of indigenous peoples by the assumably superior culture, with the simultaneous benefit of neutralising resistence to colonial expansion.[16]

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[12] Ibid, 71-74.

[13] See, for example, Memmi, The Colonizer and the Colonized at 79-86; Ransby, "Columbus and the making of historical myth" at 82; and Michael Stevenson, "Columbus and the War on Indigenous Peoples", Race and Class 33,3, 1992, at 36-41.

[14] L.F.S. Upton, "Origins of Canadian Indian Policy", Journal of Canadian Studies VIII, 1973, at 55.

[15] The Colonizer's Model of the World, 1993, at 24.

Significantly, the existence of aboriginal nations prior to the configuration of the contemporary state Canada in 1867 is romanticised, homogenised, and made irrelevant by historico-mythology to the 'real' history which followed the establishment of European populations and politics in Canada. This mythical rendering of aboriginal nations has been part of the way in which Canada has avoided recognising less savory portions of its genesis and part of its "insistence on justifying conquest".[17] Where acknowledged, colonial land theft and physical and legislative brutality are glossed over by the colonisers as evils necessary for the greater colonial project.[18] Now, decades or centuries removed from most of the worst excesses of colonialism, Canadians know only the sanitised and partial 'school-book histories'[19] that, through the selective construction of history into a story celebrating 'founding nations' and 'settlement', are what Barbara Ransby calls "a fundamentally racist formulation" justifying conquest, ethnonocide and land theft.[20] A news item on CBC Radio recently underlined this point. The event of Edmonton's 200th anniversary was noted, accompanied by the radio host's wonder at what it must have been like for the "first people" who came to this impliedly vacant land, the settlers for whom Canada advertised in England, promising free land and easy wealth as inducements to immigration.[21]

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[16] Edward Said discusses this process as a consequence of imperialism and colonialism in Culture and Imperialism, 1994, at 9 and generally.

[17] Roxanne Dunbar Ortiz, "Aboriginal People and Imperialism in the Western Hemisphere", Monthly Review 44,4, 1992, at 3.

[18] Michael Asch, "Aboriginal Self-Government and the Construction of Canadian Constitutional Identity", at 79.

[19] Manuel and Posluns, The Fourth World, at 8.

This construction of 'History is "used to legitimize a certain power structure".[22] Canadian history, together with law and policy, have erected what Said calls "the consolidated walls of denial" of "imperialist ideology and colonialist practice"[23] that are the origins of this state.

The way in which aboriginal nations have been made Other is typical of colonial endeavours, and has served to both justify colonial actions and to deny the historical and contemporary reality, in its completeness, of aboriginal existence in Canada. Colonialism's project, in Michael Stevenson's words, "was, and still is, to lay waste a people and destroy their culture in order to undermine the integrity of their existence and appropriate their riches."[24] It is pursued via "total war"[25] legitimised not only through racist construction but through creation of language celebrating colonial identities while constructing the colonised as the antithesis of human decency and development,[26] thereby establishing a justification for their physical, historical, and cultural annihilation.[27] This language "becomes the basis for the forming of national identity and for providing the state with an organising ideology" whose racist, imperialist concepts "become institutionalised as the democratic nation-state" in which hatred of the Other is bureaucratised.[28]

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[20] Ransby, "Columbus and the making of historical myth", at 82.

[21] CBC Radio, 740 AM - Edmonton, June 6, 1995.

[22] Ariana Hernandez-Reguant, "The Columbus Quincentenary and the Politics of the 'Encounter'", American Indian Culture and Research Journal 17:1, 1993, at 17.

[23] Culture and Imperialism, 1994 at 41.

[24] Michael Stevenson, "Columbus and the War on Indigenous Peoples", Race and Class 33,3, 1992, at 28. Hereafter "Columbus and the War on Indigenous Peoples".

[25] Ibid, at 28.

That is, racism becomes part of the structural base of the state, and permeates the cultural life of the dominant society, both by its exclusive narrative of dominant experience and mythology, and by its stereotypical rendering of the 'Other' as peripheral and unidimensional. For example, the use of the term 'Indian' is part of the Othering in the colonial arsenal; it bears no relation to what aboriginal nations called themselves, suggests a false unity and homogeneous nature among these disparate nations, and presents a linguistically plausible logic for the subsequent unilateral homogeneous 'Indian' policy adopted by Canada towards aboriginal peoples.

Colonial land theft was legitimised by the construction of paradigms explaining aboriginal social, political and cultural development as deficient (now, 'different') therefore making 'them' incapable of holding sovereignty or land or of resisting the civilising, modernising impulse of colonial domination.[29] Canadian law respecting the Crown's contemporary legitimacy and jurisdiction has been crafted with racial difference encoded in it, in a dualistic construction "providing the law with a profile of its own identity" and with its mandate to bring order to the orderless and civilisation in the service of progress.[30] It is also an authoritative mechanism "enforcing the validity of Western reality", buttressing the mainstream's self-identity and evolutionary importance.[31]

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[26] Ibid at 28; also, see Mary Daly, who considers the semantic tactic of reversal to be a "fundamental thought-control mechanism", Outercourse, HarperSanFransisco, 1992, at 20.

[27] Stevenson, "Columbus and the War on Indigenous Peoples" at 30-31.

[28] Ibid at 33-34.

It is through "the archetypal event of colonisation",[32] discovery, that law regarding the origins and nature of title to land becomes constructed in such a way as to void aboriginal claims to land and to validate the title of the Crown. Colonial law has employed such risible fictions as 'discovery' as a means of acquiring (someone else's) land; as the notion of terra nullius, (Blaut's "myth of emptiness"[33]), suggesting the land claimed by the Crown was essentially empty, or at least, contained no viable society with a pre-eminent sovereignty; and of terra incognita, suggesting a sovereign could claim underlying title to unknown lands. This land becomes 'settled' by 'settlers' who import the colonial law with them,[34] suggesting both untamed, unoccupied wilderness surrendering to civilisation, and concealing whose land it is that was 'settled'. Through the power of its definitional language and law, the colonial nation state constructs an authoritative filter for "the exclusion of races and cultures and (creates) a vehicle for the West's cultural hegemony."[35]

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[29] For example, see James Blaut, The Colonizer's Model of the World, 1993, at 25, where he refers to the instrumentality of "the diffusionist idea that a colonized or colonizable territory was empty of population, or was populated only by wandering nomads, people with no fixed abode and therefore no claim to territory, or lacked people with a concept of political sovereignty or economic property".

[30] Patricia Moynihan, "The Decolonization of Modern Law: Dismantling the Relation between Race and Liberal Law", Canadian Journal of Law and Society (CJLS) 8,2, 1993, at 194. Hereafter "The Decolonization of Modern Law".

[31] Ibid at 195.

[32] Michael Stevenson, "Columbus and the War on Indigenous Peoples" at 41.

[33] The Colonizer's Model of the World, 1993, at 25.

Language and Meaning

Many of the terms used in the language of the colonising societies in relation to aboriginal peoples are politically encoded with racist assumptions and assumptions about power relations. They frame a particular view of the world. Their use is problematic. At the same time, they serve as a semantic shorthand for discussion purposes and to reveal the political power of 'naming' and are used in conversation and in legal and political discussions. However, they are best used cautiously, with full regard for their politically laden meanings.

The term 'Indian' is most problematic, being first misassigned by the proto-imperialist Cristobal Colon on the occasion of his becoming lost on what was then Guanahani, now Bahamas. The Lucayans, Arawaks and Caribs in residence were collectively labelled 'Indians', evidence of wishful thinking by the errant plunderer. Not deterred by the subsequent realization that India was elsewhere, Colon and his predatory contemporaries kept the term, applying it to indigenous peoples north, south and west of Guanahani.[36]

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[34] Bayard Reesor, for example, writes "Settled colonies were regarded as extensions of Britain in the sense that British subjects took their rights under the common law with them when they moved to the colonies. ... The inhabitants of conquered colonies, on the other hand, had no such rights. The precise nature of their government, therefore, including the rights of the inhabitants, was determined after the conquest." The Canadian Constitution in Historical Perspective, Prentice-Hall Canada, 1992, at 5.

[35] Moynihan, "The Decolonization of Modern Law" at 195-96.

With perfect semantic logic though absolutely no descriptive utility, the term conveyed the notion that the resident peoples of the Americas were homogeneous as they were classified as one group, labelled 'Indians'. A host of useful (to the colonisers) mistakes flowed from this. The single label for the diverse nations served to obscure their cultural, linguistic, economic, political and other differences as between one another, while simultaneously setting them, as a constructed group, apart from the colonising societies and so denying their equivalence as human, as politically potent, and as spiritually significant. The label served to 'other' indigenous peoples, and othering is an essential part of the instrumental racism on which imperialism and colonialism relied. Being 'other' was transmuted to being less than, to being objectified, to being unidimensional, and to being demonised.

It was easy, then, for the British parliament, when considering the British North America Act of 1867, to find it unproblematic that "Indians, and lands reserved for the Indians"[37] should be a legislative subject jurisdictionally reserved to the Canadian federal government. The uniform 'Indian' policy made subsequent to section 91(24) made no distinctions between the culturally and linguistically distinct nations which fell within its parameters. Today, 'Indian' is the colloquial term applied to and by indigenous peoples, but its roots are poisonous for indigenous authenticity and distinctiveness.

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[36] Malinda Smith, "Indigenismo -- Colonial Culture and Discourses: The Remaking of Arawaks and Caribs", unpublished manuscript, Department of Political Science, University of Alberta, 1996.

[37] Section 91(24), formerly the British North America Act 1867, now the Constitution Act 1867.

Indian, native, aboriginal, and indigenous are all used colloquially to refer to Indians as described above; however, the latter three terms are also used to refer to persons who are not status within the meaning of the Indian Act but who are aboriginal within the meaning of the Constitution Act 1982.[38] Band, tribe, and (first) nation are used, sometimes interchangeably, by academics, the Canadian and provincial governments and by indigenous peoples, to designate contemporary aboriginal political communities. The term 'band' achieves its legal significance in the Indian Act, which recognises bands as the formal collective unit residing on reserves, which are 'lands held by Her Majesty for the use and benefit of' the band. The band, then, is the entity recognised by and in some cases created by the Indian Act, and as such, is now a concept as well as an object of colonial ideology. In some cases the Indian Act-recognised band entity coincides with a pre-colonial unit; in other cases, it is part of such a unit or an amalgamation of parts of entirely separate units, also generally referred to as bands. The forms and parameters of band governance are defined by the Indian Act and by federal policy and legislation specifying replacement or supplementary regimes for the Indian Act.

'Tribe' also holds dual meaning: the anthropological meaning in the context of a socio-cultural and political unit, which may be comprised of several smaller units, and the slightly derogatory term implying primitive, inferior non-western characteristics incompatible with the breadth or depth of political powers on par with imperial western states. Indigenous peoples were seen as "lacking the political development to qualify as nations, incapable of self-government, and needing the paternalistic protection of their white 'superiors'."[39] This useful bigotry persists, now dressed up in the discursive long pants of the historical inevitability of progress. For example, Chief Justice Muldoon assumed inexorable colonialism when, in obiter in Twinn, he stated: "North America was surely going to be occupied and dominated by Europeans because of historical and economic processes which were unavoidable. There is no use in mourning that fact of destiny."[40] Elsewhere, Muldoon declared:

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[38] Section 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

Political usage, for example as in the Charlottetown Accord negotiations, is to include both status and non-status Indians in the term 'Indian'.

> Peoples found to be in a more primitive (i.e.hunting) state of development than the others' state (i.e. industrial or post-industrial) are emphatically not inferior peoples. Their state of development might be likened by analogy to 'adolescent compared with the others' ...[41]

The good judge, then, appears to subscribe to Samuel Huntington's 'stages of development' justification for American or American-style military, political and economic hegemony. This brand of wilful conceptual blindness has been identified by Gerald Alfred as a significant problem for its sufferers in dealing with contemporary "(i)ndigenous political activism around self-government and aboriginal rights initiatives (that) are assertions of

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[38] Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights, Clarendon Press, Oxford, 1995, at 22. Hereafter Multicultural Citizenship.

[39] Sawridge v. Canada (FCT) (1995) at page 45.

[41] Muldoon J. in Sawridge, at paragraph 88.

nationhood and which state theorists discount as 'tribalism'".[42]

Nation, or 'first nation' is a more contemporary term that has, erroneously, become virtually synonymous with 'band'. 'Nation', in Will Kymlicka's words, "means a historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and culture".[43] Initially invoked to denote a political status deserving respect, and of a character sufficient for claims of rights to governance -- that is, initially invoked to locate aboriginal collectivities as separate political entities resisting colonial domination -- the term is now applied freely to 'bands', which in many cases are more accurately parts of or even fragments of nations. The Assembly of First Nations, the national umbrella organisation for status Indians represented through bands, is a chiefs' organization; that is, it is the chiefs of bands constituted under the Indian Act who have voting rights in the AFN, and status Indians and bands are its constituency. All of this has resulted in the conflation of Indian Act - defined bands with the designation 'first nation', with sometimes logical but occasionally perverse results.

A case in point is the Woodland Cree band, self-styled a 'first nation', a manipulated creation of the Department of Indian Affairs in its continuing effort to eliminate the problematic claims of the Lubicon Lake Cree. In this case, the Woodland Cree is a wholly-new band created under section 17 of the Indian Act subsequent to one of the 1985 amendments, empowering the Minister of Indian and Northern Affairs "to divide or amalgamate bands virtually at will".[44] Its members consist of a disparate group, most apparently only peripherally associated with the Lubicon Lake band, but nevertheless constituted in such a fashion as to manipulate the internal politics of that band. That is, these persons were allegedly investigated for pliability by the federal government, and then given status under the Indian Act in the Lubicon Lake Band, despite band protests.[45] Then, these persons petitioned the Minister of the Department of Indian and Northern Affairs to create a new band[46], citing dissatisfaction with the current leadership of the Lubicon Lake band, in particular with Chief Bernard Ominiyak. The Minister then moved with alacrity to create the new band, and (though more than fifty years has elapsed without federal and provincial resolution of the Lubicon Lake claim) to grant it lands and monies from the Lubicon Lake band's potential settlement. Further, both federal and provincial governments then took the position that Ominiyak's leadership was suspect and therefore his strategy for land claims settlement was suspect, and ultimately, that not only his support base but his band's membership base was eroding, thereby decreasing the band's entitlement. This, of course, served to legitimate federal and provincial intransigence on the Lubicon claim, at the same time that it sapped the energy of the Lubicon strategists and the hope of authentic band members. In this way, some indigenous people are co-opted into a colonial strategy against other indigenous people, in genuine attempts to find identity and security -- all of which have a priori been undermined by the colonial governments.

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[42] Gerald Alfred, Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism, Oxford University Press, Toronto, 1995, at 10-11. Hereafter Heeding the Voices of Our Ancestors.

[43] Will Kymlicka, Multicultural Citizenship at 11.

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[44] John Goddard, The Last Stand of the Lubicon, Douglas & McIntyre, Vancouver/Toronto 1991, at 209.

[45] Presentation by Fred Lennarson at the University of Alberta, December 6, 1995.

[46] John Goddard writes "Not since the early treaty days had a band been formalized so quickly -- within twelve weeks of Young's application, and ahead of about seventy aboriginal societies across the country who had been waiting for up to fifty years for band status, including six of the isolated communities in the Lesser Slave interior." The Last Stand of the Lubicon, Douglas & McIntyre, Vancouver/Toronto 1991, at 209.

Status, non-status, treaty and non-treaty are terms designating the standing and entitlements of individuals and groups of Indians. The Canadian Constitution treats Indians and Indian lands as a jurisdictional subject of the federal government[47], and more recently, affirms "existing aboriginal and treaty rights"[48], thereby recognising the treaties signed between representatives of the Crown and indigenous nations. The constitutional obligations that flow from those agreements, the legal and programmatic rights of Indians recognized as status by the Indian Act, and others, ethnically or culturally indigenous, but who are not recognised in one of the above ways, are determined by one's category of Indian, listed above. Status Indians can also be 'treaty', if they are members of a nation that is party to a treaty, or 'non-treaty', if not. For example, virtually all first nations in the province of British Columbia are currently non-treaty, though recognised as 'status' by the federal government for the purpose of the Indian Act.

Self-government and self-determination have become increasingly intertwined, as indigenous resistance to colonial domination ranges from asking for a measure of local government in a relatively insular and insulated arena -- the reserve land base -- to contesting the legitimacy of the state and demanding reparations, and a form of political and economic autonomy consistent with the self-determination language of international law, within yet apart from the state. It is Canadian governments who now call for 'self-government', often a euphemism for administrative delegation of Department of Indian and Northern Affairs' (DIAND) power[49], while some indigenous voices dismiss that as a mess of political potage and turn to international law and the international arena to call for return of lands and resources, together with political powers approximating those of states themselves. It is worth noting at this point that the racist apartheid regime in pre-1995 South Africa also used the language of 'self-government' to suggest its miniscule bantustans were positive affirmations of African political and cultural organisation, a semantic parallel that bears some consideration in the Canadian context as well.[50]

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[47] Section 91(24) of the Constitution Act 1867.

[48] Section 35 of the Constitution Act 1982.

Conventional Historical Myths

The dominant narrative of Canadian beginnings, from heroic pioneers taming uncharted wilderness to contemporary socio-political consequences, assumes the validity of certain historical beginnings and of legitimacy in deeply embedded cultural formations. In this way it takes on the lustre of common sense, of what everyone 'knows' about the origins and nature of society. This structured reproduction of selective knowledge ensures a hegemonic social consciousness maintained by culturally diffused mechanisms so that, in Said's words,

> the whole cultural corpus retains its essentially imperial identity and its direction ... The internalization of norms used in cultural discourse, the rules to follow when statements are made, the 'history' that is made official as opposed to the history that is not: all of these of course are ways to regulate

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[49] As, for example, the federal government's 1996 "Inherent Rights Policy" which is designed for administrative delegation of federal powers to band councils.

[50] Nelson Mandela, Long Walk to Freedom: the Autobiography of Nelson Mandela. Little, Brown and Company, Toronto, 1994, at 338.

public discussion in all societies.[51]

Through scholarship, law, politics, policy and culture, the dominant narrative reproduces itself while legitimising and reifying its origins. At the root of this selective history is the colonial denial of land theft (made easier by the fortuitous vulnerability of aboriginal populations to common European diseases, leading to decimation of indigenous populations)[52] and the subsequent attempts to legitimise or erase that theft. As a choice contemporary example of this, Asch examines Canada's 1989 arguments[53] against the Gitksan-Wet'suwet'en land claim in Delgamuukw[54] and concludes that "Canada doubts that the Gitskan were ever civilized enough to have sovereignty; but that ... if they did have it, the mere assertion of sovereignty by Great Britain was enough to extinguish it."[55] The Court concurred, stating that, in relation to colonial paramountcy, "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vest in the Crown."[56]

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[51] Edward W. Said, Culture and Imperialism, 1994, at 323.

[52] Blaut suggests that "the massive depopulation caused by the pandemics of Eastern Hemisphere diseases that were introduced to America by the Europeans" is the single greatest factor in establishing colonial dominance in the Americas. The Colonizer's Model of the World, 1993, at 184.

[53] "Statement of the Attorney General of Canada's Position on Extinguishment, Diminuation or Abandonment of Aboriginal Rights in the Claim Area" (Attorney General of Canada, December, 1989), cited by Asch, "Aboriginal Self-Government and the Construction of Canadian Constitutional Identity" at 471.

[54] Delgamuukw v. B.C. (1989), 38 B.C.L.R. (2d), cited in Asch, supra at note 7.

[55] Asch, "Aboriginal Self-Government and the Construction of Canadian Constitutional Identity".

[56] Ibid at 477.

As the colonial entity has never been in doubt about its paramount claim at the moment it chose to exercise it, its laws reflect its confidence and its justifications. The outcome in Delgamuukw and other cases in which land title is contested between indigenous and colonial authorities is preordained by the fact that the law, and the courts that interpret and administer it, are colonial emanations and constructs. They are the rules of the ruler, interpreted by the ruler through the lens of selective, racist history. They construct the "settlement thesis",[57] premised on assumptions that colonising populations were inherently superior to indigenous ones as measured on a quasi-evolutionary linear progression of human development, and that the more 'advanced' society is the one entitled to claim political supremacy, and indeed, the 'primitive' societies will benefit from accelerated development. Asch notes that the settlement thesis is highly compatible with "universalistic ideology"[58] which requires minority peoples to submit to "the domination of the institutions of the majority population". The settlement thesis asserts that "history begins with contact", while Canada's universalistic ideology legitimises the denial of the inherent rights of internal minority populations by the colonising majority.[59]

Two separate but related items on CBC Radio demonstrate how appropriation of land and resistance to colonialism continue today. On Morningside, Peter Gzowski interviewed three aboriginal people about the shooting of three apparently unarmed aboriginal protestors at Ipperwash on September 6th, 1995 and about the concurrent standoff at Gustafsen Lake.

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[57] Ibid at 485-488.

[58] According to Asch, "Universalism suggests that the 'majority' is the collective of equal individuals who make up the population of the state." Ibid at 488.

[59] Ibid.

All three asserted that contestation of land and history is fundamental to understanding and resolving these kinds of conflicts. Later in the day, Vicky Gabereau interviewed a media personality from Montreal, who gushed about the desirability of Canada having a population of 75 million: "Why not? We've got the land."[60] Indeed.

The denial of Canada's origins in colonial enterprises prevents scholars and legislators from grappling with the consequences of that initial relationship. This denial takes the form of legal acrobatics by the judiciary to deny treaty status to 'Indian' treaties (the legal concept of sui generis establishes that aboriginal treaties are agreements which are neither created nor terminated according to the rules of international law)[61]; to deny sovereignty in historically sovereign aboriginal nations; and so to deny contemporary aboriginal claims for restitution (For example, Chief Justice McEachern of the B.C.Supreme Court asserted that pre-colonial times were devoid of any redeeming characteristic for the Gitskan and Wetsu'wet'en: their lives were "nasty, brutish and short").[62]

The obscured reality of Canada's colonial foundations contributes to a contemporary Canadian psychosis, as we struggle to account for and deal with the consequences of that same colonialism while generally denying its reality. This illness is evident in the repetition of historical accounts that are partial and exclusionary, in the carefully maintained incomprehension at indigenous nations' resistance to assimilation and struggle for self-determination, in policies that purport to respond to indigenous problems, while never conceptualising settler populations' role in the construction of those problems or in the solutions. No reconciliation will grow from such dishonest and partial remedies.

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[60] CBC 740 AM Radio, Gzowski and Gabereau programs, September 7, 1995.

[61] Simon v R [1985] 2 SCR at 404. As Mary Ellen Turpel observes, "Treaties were not de facto instruments for the recognition of diverse Indigenous cultures. In reality, they were political agreements intended to make way for economic and military progress, as defined according to standards of the newcomers (and were) akin to paternalistic contracts." Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences", Canadian Perspectives on Legal Theory (Richard F. Devlin, ed.), Emond Montgomery Publications Limited, Toronto, 1991, at 521.

[62] Delgamuukw v B.C., [1991] 5 CNLR at 5.

Treating the Canadian psychosis means abandoning the frontier mythology, facing our past, and collectively creating equitable and restitutionary bases for our common future. Oka, Ipperwash and Gustafsen Lake[63] are perhaps the most publicised of recent confrontations between the colonised and the coloniser, but there are similar situations all across Canada. Cast by the media and policy-makers as ahistorical incidences of civil disobedience, social breakdown and lawlessness, they are explained by aboriginal participants as the inevitable consequences of an historically rooted struggle against external domination, and for sovereignty, land claims, and political jurisdiction.

A Colonial Indian Policy

While an exhaustive historical documentation of the initial contact of European interests seeking wealth through mercantilism and then capitalism is beyond the purview of this chapter, it is necessary to situate the neophyte nation of Canada in 1867 in the context

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[63] The Kanesetake Mohawk confrontation of first, the Surete du quebec and then the Canadian army at the contested lands in the Quebec municipality of Oka in 1990, supported by Kanewake Mohawks who barricaded the Mercier bridge in Montreal; the 1995 Ipperwash Provincial Park blockade during which certain members of the Stoney Point Chippewa band contested their (federally) enforced amalgamation with the Kettle Point Chippewa as well as the loss of land to the Canadian military, and its subsequent alienation to the province of Ontario; the month-long 1995 Gustafsen Lake armed occupation of private ranch lands by various aboriginal peoples and non-aboriginal supporters, claiming that the land was sacred and unceded.

of the interplay of burgeoning capitalism and emergent and oppositional nationalism, reactive to the threat from American imperialism.[64] Confederation was a political arrangement to accommodate powerful economic interests represented by an elite segment of the colonial population: Frank Underhill's "triple alliance of federal government, Conservative party, and big-business interests".[65] That is, the state is grounded in race and class privilege.[66]

It is also grounded in male gender privilege, for only men had the capacity for citizenship; that is, the ability to engage in public affairs, formal politics, and to vote, and to hold property.[67] Women were dependent on 'their' patriarch, whether father, guardian, or husband, for economic security and political voice. Women were considered to be highly emotional, unstable, irrational, nurturative, pious, and of valuable and delicate virtue -- unless, of course, they were 'fallen women' and so unworthy of consideration.

The structured location of non-aboriginal women in early Canada was one of race privilege relative to all aboriginal people, but of gender subordination relative to emancipated non-aboriginal men. The location of aboriginal women was of race subordination relative to non-aboriginal Canadians, and of gender subordination relative to all non-aboriginal men. Increasingly, aboriginal women were also subordinated within aboriginal communities because of certain aboriginal social practices and because of the implementation of the Indian Act and the application of government bureaucracy and church-administered educational and religious propaganda.

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[64] I have chosen to identify 1867 as the emergence of the contemporary state of Canada. However, the historical record is subjective and contextual; the paper's focus on beginnings could easily be placed prior to or later than 1867.

[65] 65The Image of Confederation, The Hunter Rose Company for the CBC Learning Systems, Toronto, 1964, at 25.

[66] Indeed, an argument can be made that Canada was created to serve those interests -- 'on behalf and at the behest of' (with apologies to Ralph Miliband) -- by structuring and managing the socio-political infrastructure essential to them.

[67] See, for example, Sandra Burt, "Legislators, Women and Public Policy", Changing Patterns: Women in Canada (2nd), Sandra Burt, Lorraine Code and Lindsey Dorney, eds., (Toronto: McClelland & Stewart) 1993.

Following Confederation in 1867, the federal government moved to shape the newly united and generally self-interested provinces into a cohesive economic, social and political project. This effort crystallised as the National Policy, formally instituted in 1878[68] by then-Prime Minister John A. Macdonald. It was designed to guarantee the conditions for the development of indigenous capital: protected markets, cost-effective (that is, government-subsidised) transportation of resources and goods, and creation of a population willing and able to produce and consume that on which capital investment depended. The National Policy illustrates how partial the historical record is, and how well law and politics have converged to erase some while promoting other contributions.

The National Policy has generally been held to have three components; the building of a trans-continental railway, a protective tariff on imports, and western settlement. The railway would fulfil the promise that had lured B.C. into Confederation; it would provide transportation of eastern goods to the west, and western raw materials to the factories of Central Canada and the export docks east and west. The tariff was necessary to make the railway economically viable, by making it as cheap or cheaper to transport goods across

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[68] Bayard Reesor, The Canadian Constitution in Historical Perspective, Prentice-Hall Canada, 1992, at 82.

Canada, instead of to geographically closer American markets. The settlement of western Canada (with approved, ie. white immigrant stock) would provide labour for the needed raw materials and a market for eastern goods; it would populate the land and serve notice to the aggressive and acquisitive Americans that Canada could exercise sovereignty across the country.

The National Policy could not have been conceived or implemented without some official high-level political consideration of the fact that the lands in question were controlled by aboriginal nations, including the Metis. The railway would go through aboriginal lands; the consortium building the railway would be given aboriginal land not only for right-of-way but as payment for their endeavour; the settlers would be given aboriginal land to homestead. Edwin Black notes that a "fixed resolution of the Conservative administration was that nothing must be allowed to hinder the government's encouragement of the Canadian Pacific Railway which was a vital instrument of the Conservative national economic policy.[69]

The National Policy was dependent upon land: land for the consortium of capitalists that eventually built the railway; land for the immigrants; land over which Macdonald's government intended to exert political jurisdiction. The lands in question were not within the de facto jurisdiction of Ottawa, and the undeclared but absolutely central Part Four of the National Policy was implemented to acquire them. This, conceptualised and implemented to clear the way for unobstructed railway building, resource exploitation, and settlement, took the form of the western treatymaking endeavour, the reserve system administered under the Indian Acts, and the military conquest, land scrip chicanery, and dispersal of the Metis. Further, this policy was only pursued where colonial and aboriginal interests collided. Where aboriginal nations or parts of nations (bands) did not appear to be of immediate concern in this regard, they were, for the most part, ignored. For example, the Lubicon Lake Cree band in northern Alberta was omitted from Treaty 8.[70]

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[69] Divided Loyalties: Canadian Concepts of Federalism. -McGill-Queen's University Press, 1975, at 37.

It was expected that this process would culminate in the elimination of culturally distinct populations of 'Indians' and with their assimilation into European society. The army, the North-West Mounted Police and then the Royal Canadian Mounted Policy and the Department of Indian Affairs under its various incarnations within the federal bureaucracy, implemented the policy of assimilation by destroying aboriginal political systems and social organisation, religion, and the remnants of once-viable economies.[71] Indians were to be forced into the capitalist vision of modernity, transformed from collective societies based on communalism into an atomised society based on individualism and private property concepts. The model for this social development was that of the colonial transplant, imbued with Judeo-Christian assumptions about the relationship between individuals and God, between and among individuals and societies, and between men and women. It was also designed with the European variant of patriarchal social organisation as the template. Aboriginal women's traditional roles in their communities were in some cases partially and in others completely displaced. Together with Christianity and education, these processes, through which "(t)he colonized seems condemned to lose his (sic) memory",[72] would make assimilation inevitable.[73]

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[70] It has yet to reach an equitable resolution with the federal and provincial governments for a land base. Not coincidentally, the Lubicon claim includes land leased by Alberta, in return for significant royalty revenue, for oil exploration and for timber for pulp production; the nature of development and the revenues flowing from development have arguably solidified provincial intransigience. Meanwhile, in a classic example of 'divide and conquer', the Lubicon band has been eroded through federal recognition of dissident groups who have been given separate band status and land bases, which are substantially less than that being claimed by Lubicon Chief Bernard Ominiyak. Now, Alberta has withdrawn its latest offer of settlement, arguing that because of this erosion, Lubicon lacks the population base to justify that settlement. The Lubicon continue to languish in poverty and political limbo, a federally and provincially imposed punishment for Lubicon's insistence on its historical land and resources claims against both orders of government.

[71] See, for example, Manual and Posluns, supra at 1, 19-21, and R.N. Wilson, "Our Betrayed Wards", written in 1921 by a disenchanted (and later fired) Indian Agent, reprinted in the Western Canadian Journal of Anthropology, Vol.IV, No.1, 1974.

The Crown's Historical Duplicity

Treaty-making was presented as a compulsory benefit to the original signators: compulsory, in that negotiations were presented in circumstances that made it clear the option of not treating would be worse than signing the treaty; yet beneficial in that promises and representations were made suggesting that the colonisers had the best interests of aboriginal nations at heart. The Crown's military and police presence indicated coercion, while the language used was honeyed with symbolic representation of peace, mutuality, security and well-being for all time. The application of the first post-Confederation 'Indian

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[72] Memmi, The Colonizer and the Colonized at 103.

[73] Marie Smallface Marule, "The Canadian Government's Termination Policy: From 1969 to the Present Day", One Century Later (Getty and Smith, eds.) UBC Press, Vancouver, 1978; L.F.S. Upton, "Origins of Canadian Indian Policy, Journal of Canadian Studies VIII, 1973; John Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy", As Long As The Sun Shines and Water Flows (Getty and Lussier, eds.), UBC Press, Vancouver, 1983; George Manuel and Michael Posluns, supra at note 1.

Act' (1869) was never mentioned. Rather, assurances of continued aboriginal autonomy were made, together with promises of material 'gifts'. Nor were aboriginal negotiators entirely naive. Many expressed concerns and scepticism about the government's motives and scruples.[74]

The Queen, who never actually participated in treaty-making, was represented by her commissioners as a deified parent, aware of and desirous of the best interests of Indians, munificent, all-knowing, and trustworthy. The language shows how this image was manufactured:

> "your Great Mother, the Queen" ... "her hand is also open to reward the good man everywhere in her Dominions"; "your great mother wishes the good of all races ... wishes her red children to be happy ... to live in comfort ... adopt the habits of the whites ... She thinks this would be the best thing for her red children ... But the Queen ... has no idea of compelling you to do so. ... Your Great Mother ... will lay aside for you 'lots' of land to be used by you and your children forever ... as long as the sun shall shine, there shall be no Indian who has not a place that he can call his home, where he can go and pitch his camp ...".[75]

This relationship was extended to representatives of the Crown. For example, in reference to Indian Commissioner Wemyss Simpson: "when you hear his voice you are listening to your Great Mother the Queen".[76] Consequently, it is not surprising that Simpson was able to write that "The Indians ... have a firm belief in the honour and integrity of Her Majesty's representatives, and are fully impressed with the idea that the amelioration of their present condition is one of the objects of Her Majesty in making these treaties."[77]

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[74] For example, Alexander Morris records the skepticism and distrust of a Chippewa, Nuswasoowahtum: "I see dimly to-day what you are doing, and I find fault with a portion of it; ... through what you have done you have cheated my kinsmen." The Treaties of Canada with The Indians, Belfords, Clarke & Co., Toronto, reprint 1971, at 224.

[75] Ibid at 27-29.

[76] Ibid at 30.

Representatives of the Crown promised that there would be no enforced change of lifestyle and of rights:

> When you have made your treaty you will still be free to hunt over much of the land included in the treaty. Much of it is rocky and unfit for cultivation, much of it that is wooded is beyond the places where the white man will require to go, at all events for some time to come. Till these lands are needed for use you will be free to hunt over them, and make all the use of them which you have made in the past. But when lands are needed ... you must not go on them any more. There will still be plenty of land that is neither tilled nor occupied where you can go and roam and hunt as you have always done ...[78]
>
> It may be a long time before the other lands are wanted, and in the meantime you will be permitted to fish and hunt over them.[79]
>
> I do not want to interfere with your hunting and fishing ... pursue it through the country, as you have heretofore done ...[80]
>
> I want the Indians to understand that all that has been offered is a gift, and they still have the same mode of living as before.[81]
>
> The Government will not interfere with the Indian's daily life; they will not bind him.[82]

But the colonial objective of obtaining "cede and surrender" agreements from the 'Indians' remained paramount. Alexander Morris, writing of the conclusion of Treaties One and Two, declared: "Eventually on the 3rd of August, 1871, a treaty was concluded, its principal features being the relinquishment to Her Majesty of the Indian title (emphasis

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In a letter to the Secretary of State for the Provinces, dated November 3, 1871, in Morris, ibid at 42.

[78] Ibid at 29.

[79] Ibid at 58.

[80] Ibid at 204.

[81] Ibid at 221.

[82] Ibid at 241.

mine).[83]

Numerous comments recorded by Morris indicate that, contrary to colonial legal assertions that aboriginal title was not landholding proper and was merely personal and usufructory in nature,[84] aboriginal nations were insistent that their title be recognised:

> (T)hey wished to have two-thirds of the Province as a reserve[85] ...
> excited on the subject of their lands being occupied without attention being first given to their claims for compensation; they were unwilling to allow the settlers the free use of the country ... the quantity of land demanded for each band amounted to about three townships per Indian[86] ...
> (Indians) dissatisfied at the use of the waters, which they considered theirs, having been taken without compensation ...[87]
> and water, wood claimed by Indians in negotiations and compensation for whites' use of it requested[88]
> Mawedopenais declared: "All this is our property where you have come."[89]
> "(W)e have a rich country ... the white man has robbed us of our riches".[90]
> David Laird, who negotiated for Canada in Treaty Seven, noted that "The Blackfeet are extremely jealous of what they consider their country, and have never allowed any white men, Half-breeds, or Crees to remain in it for any length of time"[91]

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[83] Ibid at 31.

[84] An early construction of this most useful legal fiction is presented in St. Catharine's Milling and Lumber Company v. The Queen, (1889) 14 A.C.

[85] Supra at note 60, at 31-34.

[86] Ibid at 37-39.

[87] Ibid at 51.

[88] Ibid at 56-57.

[89] Ibid at 59.

[90] Ibid at 62.

[91] Ibid at 249.

Further, aboriginal negotiators protested the use of their lands and resources by invading settlers and by the Hudson's Bay Company (which had, of course, a dispensation from the British Crown to do precisely that) and asserted primacy over the H.B.C. claims to land and resources.[92] The Gambler, a negotiator for the Qu'Appelle Treaty, charged that "the Company has stolen our land".[93] In other negotiations, Sweet Grass, a Cree, declared: "We heard our lands were sold and we did not like it; we don't want to sell our lands; it is our property, and no one has a right to sell them."[94] And Morris revealed the duplicity of the government: "Furthermore, the Indians seem to have false ideas of the meaning of a reserve. They have been led to suppose that large tracts of ground were to be set aside for them ..."[95]

Nor were the colonial agents content to simply obtain the legal fiction of land cessions. Consistent with the needs of the colonial government, they endeavoured to instruct the various nations on political development. The Indian Act-preferred model of one male chief who speaks for all was required for entrance into treaty. "I thought it advisable to require that the several bands of Indians should select such Chiefs as they thought proper, and present these men as their authorised Chiefs, before anything was said as to the terms of a treaty" wrote Wemyss Simpson.[96] Not content to simply suggest political change, colonial agents actively engaged in it. Morris wrote "The difficulties are the inability of the

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[92] Ibid at 82.

[93] Ibid at 101-102.

[94] Ibid at 170.

[95] Ibid at 3.

[96] Ibid at 38.

Indians to select a high or principal chief from amongst themselves ..."[97] and "Yellow Quill was appointed chief by the Hudson's Bay Company ..." and, despite the objections from the people concerned that they had another man in mind, Morris made it clear that "Yellow Quill must remain a chief".[98] This political interference happened repeatedly: "I then called on the White Mud River Indians to select a Chief and one Councillor ... (I did) "request them ... to select a Chief and Councillors".[99]

The plains nations were primarily organised with men in the dominant political roles, though there are cases, remarkable because of their exception from the norm, of women assuming leadership roles. Again, language is revealing: consider the special designation in Blackfoot of 'manly-hearted woman',[100] reserved for those anomalous cases of women who chose social roles normally held by men. The norm for bravery, courage and leadership was male; women's approximation of this was evidence of a male-like attribute. At the same time, it is significant that certain women could and did make that choice; the power to choose, while no doubt socially fraught, did exist. Further demonstrating a measure of women's relative power, the Blackfoot nations' structure of religious organisation included women's societies which held a substantial measure of power, fully integrated in the entire structure.[101] It was a power that non-aboriginal women could only dream about. And it was a power eroded by the state and church attacks on aboriginal social practices and replacement with colonial ones.

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[97] Ibid at 54.

[98] Ibid at 135.

[99] Ibid at 141-150.

[100] Ninaakiiwa, manly-hearted woman.

[101] For example, the Motokiiks society.

A Seamless Web of Colonial Policy

The history of indigenous-settler relations is characterised by relations of domination and subordination, racism, and exploitation. It would be nice to think things had changed. Superficially, perhaps they have, but at the level of fundamental power relations and control of wealth, relations remain much the same. Here, I turn to the more contemporary manifestations of Canada's continuing colonial practices, justified by law and assumptions of state legitimacy and packaged as land claims settlement formulas and so-called 'self-government' policies.

Generations of critical policy reviews by Royal Commissions and Parliamentary Committees[102] considering indigenous peoples in Canada have been ignored by successive governments. The state continues to insist on policy that is grounded in the foundational myths of the legitimacy of colonial and contemporary appropriation of land and resources, in the face of evidence of prior claims by indigenous nations. Not surprisingly, these policies have been unable to create equity or stability.

The federal government's comprehensive claims policy of 1973 introduced the euphemism of 'exchange' for 'extinguishment'. In 1975, the James Bay and Northern Quebec Agreement became the first treaty concluded under the new policy. This bold new initiative

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[102] Most recently, Indian Self-Government in Canada (The Penner Report), Report of the Special Committee on Indian Government, Canadian Government Publication Centre, 1983; Living Treaties: Lasting Agreements (The Coolican Report), Report of the Task Force to Review Comprehensive Claims Policy, DIAND, Ottawa, 1985; The Royal Commission on Aboriginal Peoples, Supply and Services Canada, 1996.

"incorporates almost verbatim the wording of the blanket extinguishment clauses of the numbered treaties", that is, that aboriginal parties "cede, release, surrender and convey all their native claims, rights, titles and interests, whatever they may be, in and to land in the Territory and in Quebec".[103] The Northeastern Quebec Agreement of 1978 and the Inuvialuit Final Agreement of 1984 contain similar extinguishment clauses.

The 1985 federal Task Force (Coolican) Report entitled Living Treaties, Lasting Agreements[104] recommended that extinguishment be abandoned as the necessary condition for claims settlement.[105] The report suggested that the federal-Indian relationship has been frustrated by the federal insistence on both its own legal view of the world, and by its adherence to extinguishment as a condition of settlements. By way of alternatives to extinguishment, the report called for a policy whose first characteristic is that "it must be acceptable to the aboriginal people concerned".[106]

The Coolican Report suggested that, despite the 1982 constitutional amendments "recognising and affirming existing aboriginal and treaty rights",[107] Canada's intent to eliminate legal vestiges of aboriginal claims has increased in recent times, rather than decreased.

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[103] Royal Commission on Aboriginal Peoples, Treaty Making in the Spirit of Co-existence, Minister of Supply and Services Canada, 1995, at 36-37. Hereafter cited as RCAP, Treaty Making.

[104] Living Treaties: Lasting Agreements (Report of the Task Force to Review Comprehensive Claims Policy, Ottawa, Department of Indian Affairs and Northern Development, December 1985.

[105] Ibid at 40.

[106] Ibid at 41.

[107] S.35, Constitution Act 1982.

> (T)here has been a gradual but distinct change in the way in which aboriginal title has been extinguished in Canada. Before Confederation, it was considered sufficient if specific rights were surrendered voluntarily by the Indian peoples. The numbered treaties introduced the complete surrender ... [which] effected an extinguishment of rights. In the modern agreements, an additional mechanism has been included, namely, the blanket extinguishment of all rights by the Crown, through a legislated clause.[108]

To date, the Canadian state has indicated a preference for 'business as usual' in aboriginal policy, in particular, dissembling on the question of outstanding land claims and treaty obligations. In the Trudeau government's 1969 White Paper[109] the government suggested the speedy termination of reserves and of separate status, preferring to treat reserves and status rather than colonial land theft as responsible for Indian poverty and marginalisation, and called the treaties 'anomalies' unworthy of the name. Instead of separate status for Indians and Indian lands, the White Paper advocated assimilation into the Canadian mainstream. It was rejected by Indians across Canada and indeed, served as a useful catalyst in Indian political mobilisation.

From the White Paper's outright rejection of the validity of the treaties to the present federal policy of recognising rights in order to extinguish them, there has been an implicit refusal to review the indigenous-Canadian relationships.[110]

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[108] Supra at note 85, at 40.

[109] "Choosing a Path", DIAND, Ottawa, 1969.

[110] A later Trudeau government advanced Bill C-52, "Optional Indian Government Legislation" through 1983-84 (though it died when the government lost the 1984 election to the Mulroney Tories) despite the fact that ongoing constitutional conferences on aboriginal government indicated this delegated, legislated, municipal model was unacceptable to aboriginal people. However, the Sechelt Indian Band Self-Government Act (R.S.C. 1985) was passed by the Mulroney government, conferring quasi-municipal status

Given the lack of federal response to the Coolican Report's recommendations one can be forgiven for doubting that the federal government will heed the final report of the Royal Commission on Aboriginal Peoples[111] which recommends substantial structural and policy developments and budget appropriations for aboriginal inclusion. The 1992 Charlottetown Accord contained proposals which had the potential to transform indigenous-Canadian relations in that they arguably provided for a negotiated entrance into Confederation, together with affirmation of the inherent right of governance, constitutional status, guaranteed representation in Parliament, and a substantial measure of constitutionally recognised jurisdiction within the federal structure.[112] However, the Accord is only a might-

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on the Sechelt Band. The Mulroney government also initiated the Community Based Self Government (CBSG) process, a municipal model of even less potence than Sechelt's legislated model.

[111] Royal Commission on Aboriginal Peoples, Final Report, Volumes 1 through 5, Supply and Services Canada, Ottawa, 1996.

[112] Assembly of First Nations National Chief Ovide Mercredi had supported the Charlottetown proposals. The AFN was to review and ratify or reject the Charlottetown Consensus Report at a Special Assembly called for that purpose, September 14-16, 1992, at the Squamish Nation in Vancouver. However, after three days of intense and polarised debate, with the benefit of some clever procedural politics, quorum was destroyed and the Chiefs made no decision on the only resolution on the agenda. That resolution would have confirmed AFN support for the English version of the Charlottetown Accord. A consensus statement was issued in its place, which essentially left it to each First Nation to determine whether it would support the Accord.

At issue was the impact of engaging in Canadian constitutional development on the sovereign status claimed by many First Nations; and especially on the application of the Charter of Rights and Freedoms to First Nations. The Consensus Resolution states: That the AFN has been involved in the negotiation of the Charlottetown Accord; and that the AFN is not in a position to ratify or reject the Charlottetown Accord; and that recognising their inherent authority the First Nations in each region decide on how to proceed with the referendum on October 26, 1992; and that the First Nations in each region will decide on the process to determine whether or not to ratify the proposed Constitutional Accord; and that the Chiefs-in-Assembly express support for the National Chief to continue negotiations to pursue the Constitutional objectives of the Assembly of First Nations and to clarify the have-been now, and discussion of the many reasons for its failure with the dominant and aboriginal populations are beyond the scope of this chapter.[113] Suffice it to say that the Charlottetown potential is not being reflected in current policy initiatives emanating from DIAND. The current DIAND package[114] is less than Charlottetown by a long shot. Quasi-provincial status, as a third order of government within the federal structure, is not contemplated. Rather, the proposal advocates a-quasi-municipal status, a delegation of a measure of powers from the existing constitutional orders of government, who continue to hold the full measure of constitutional power. And the federal government continues to dangle the carrot of extinguishment, now framed as the mechanism creating 'clarity'. As the Royal Commission on Aboriginal Peoples (RCAP) observed, "clarity is achieved by a relatively straightforward clause indicating that certain or all rights associated with Aboriginal title are extinguished".[115] While the RCAP views clarity and certainty as valid objectives, it suggests that extinguishment is a legally and conceptually flawed tool with which to accomplish these objectives.[116]

Not all observors have been so critical. "Learning from the painful lessons of Meech Lake and Charlottetown, the government has decided to sign separate agreements with bands and communities as soon as they are prepared to accept new responsibility" proclaimed the

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implications of
the Accord so that it may be put forward for decision in First nations communities.

[113] The Accord was rejected by Canadians in the national referendum of October 1992.

[114] DIAND internal document, 1995.

[115] RCAP, Treaty Making, 1995, at 43.

[116] Ibid at 57-58; and at 45-46.

Edmonton Journal.[117] But it is not responsibility that "bands and communities" must take up, but a new relationship, one where "bands and communities" function as creatures of the federal, and perhaps also of the provincial, governments. It is the re-presentation of subordinate status, through the co-opted language of 'self-government'.

Despite the recommendations in the Coolican Report that extinguishment be abandoned, it was reaffirmed by the Chretien government and Department of Northern and Indian Affairs Minister Ron Irwin in 1993 in Federal Policy for the Settlement of Native Claims.[118] So-called 'self-government' models advanced by the federal government via DIAND continue the century-old practice of dictating form, style, and parameters of 'Indian' government. These have the effect of stripping inherent political agency from 'bands' and rendering them mere administrators of DIAND policies by way of delegation of federal programs and services.

The current federal land claims process continues to frame the parameters of possibility in historical mythology: the underlying, pre-existing and pre-eminent title of the Crown and on the common law notions flowing from that fiction, and on the generally implicit doctrine of parliamentary sovereignty, the application of which legitimises any legislative initiative purporting to limit or eliminate aboriginal rights or land interest. Federal concern with comprehensive land claims is instrumental: it will recognise rights so that they may be extinguished and it will negotiate settlements only on that condition. The

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[117] "Native self-government: Canada tries again", August 12, 1995, at A6.

[118] Indian and Northern Affairs Canada, March 1993. The options of full or partial extinguishment are proferred.

Crown is deemed to have a pre-eminent title by virtue of its pre-1967 existence made manifest in "the colonies".

Within this conceptual framework, aboriginal rights, including political rights and sovereignty in relation to land, exist subject to the pleasure of the Crown or its agent, Parliament. The federal claims settlement policy with its premise of the objective of extinguishment is entirely consistent with this framework. Any critique of the policy which challenges its basic premises is challenged because it deviates from the legal and philosophical orthodoxy underpinning Canada's genesis and continuing legitimacy. Indeed, such a critique, if taken seriously, has the potential to reveal that Canada is, after all, merely the result of opportunistic imperialism and successful land theft.

The federal government "policy for the settlement of native claims" statement of March 1993[119] makes it clear that, for the federal government, aboriginal rights and title derive from British common law, and that policy has been "closely linked to court decisions". The policy paper cites legal precedent[120] as establishing the point in law (the rules of the ruler) that "the exercise of Aboriginal rights could be regulated by government".[121] Rights are deemed to be sui generis and of the common law.[122] The policy paper notes that "Aboriginal peoples and governments often come to the table with fundamentally different conceptions of the nature of Aboriginal rights and the form which the final settlement should take."[123] Inevitably, government conceptions determine the parameters of political possibility.

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[119] DIAND, 1993, Supply and Services, Ottawa.

[120] R. v Sparrow [1990] 3 CNLR (SCC).

[121] Federal government "policy for the settlement of native claims", March 1993, at 1.

[122] Ibid at 2.

Of the historical treaties, the policy paper asserts "In exchange for certain rights and benefits, such as the receipt of reserve lands, Indian groups in parts of Canada have surrendered their claims to Aboriginal rights."[124] (emphasis mine) The language of "exchange" as a euphemism for extinguishment continues: discussing the 1986 revised Comprehensive Claims Policy "Exchange of Rights", DIAND policy in 1993 asserts:

> It is often stated that the federal government is seeking to end, or extinguish, all Aboriginal rights ... This is not the case. The government's objective is to negotiate agreements that will provide certainty of rights ... To accomplish this, Aboriginal groups are asked to relinquish undefined Aboriginal rights ... in favour of the rights and other benefits which are written down in the settlement agreement.[125]

Of comprehensive claims, the document says the primary purpose is to conclude agreements that "will resolve legal ambiguities associated with the common law concept of Aboriginal rights".[126] It adds, "The objective is to negotiate **modern treaties**" (emphasis mine) which define rights.[127] But "modern treaties" are not intended to be treaties as understood, historically or now, by aboriginal peoples. The document declares that "(n)egotiated comprehensive claims settlements provide for the exchange of undefined Aboriginal rights for a clearly defined package of rights and benefits codified in constitutionally protected settlement agreements."[128] That is, negotiations must culminate in extinguishment of aboriginal rights and their replacement with a legally defined package of 'rights'.

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[123] Ibid at 8.

[124] Ibid at 2.

[125] Ibid at 9.

[126] Ibid at i.

[127] Ibid.

Most recently, the Yukon Umbrella Final Agreement, structuring land claims, shared political jurisdiction and First Nations governments, was proclaimed on February 14, 1995. It is an important step towards an institutionalised mutual arrangement between indigenous nations and the Crown. But it is still premised on the unquestionable legitimacy of the Crown, rather than reflecting, at a minimum, the ambiguity that should attend that pre-eminent claim.

Nunavut, touted as an example of aboriginal governance, should not be confused with governance pursuant to section 35 of the Constitution Act 1982. It is not an expression of the inherent right and does not attract protection under section 35. Nunavut is public government and a significant northern evolution. As with other territorial governments, convention notwithstanding, jurisdiction ultimately rests with the federal government. Nunavut is, for now and perhaps for the foreseeable future, predominantly aboriginal, but regardless of changes in ethnic composition over time, it is constructed as a public government, with responsibilities, like all other public governments in Canada, to all of the people within its jurisdiction, not just to aboriginal people.[129]

The Royal Commission on Aboriginal Peoples notes that "(b)oth the Yukon

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[128] Ibid.

[129] I am indebted to Gurston Dacks for his helpful February 13, 1995 discussion of Nunavut.

Agreement and the Nunavut Agreement represent progress with respect to the relationship between land claims and self-government negotiations.[130] There is, perhaps, evidence of a decay in racism which may formerly have precluded the creation of public government dominated by indigenous peoples (see Louis Riel's unfortunate experience). Meanwhile, British Columbia's recent and welcome foray (in a province historically hostile to contemplation of the existence of aboriginal rights) into the land claims arena, potentially without extinguishment preconditions, is yet to be tested by the culmination of agreements.

The historico-legal construction of a perpetual, pre-eminent underlying title of the Crown continues today, despite its apparent instrumentality for colonial interests and equally apparent lack of objective truth. Not only history but the rules which define the contemporary relationship of the coloniser and the colonised are made by the victors. Rather than seeking a partnership with indigenous nations through a continuing, evolving constitutional relationship, Canada has always sought to extinguish indigenous particularity and to incorporate it into the state.

The imperialist/colonializer society emigrated to become the settler, whose laws are now taken to define the parameters of the possible. Indigenous peoples live marginalised and impoverished lives in Canada, the best place in the world for non-aboriginal men to live.[131] The imperialist/colonizer has not 'gone home' and now, generations removed and hybridized, arguably cannot 'go home'. We continue the separation of aboriginal and colonial realities, with the latter benefitting because of its continuing appropriation of the wealth of the former, who continue to struggle to survive. Neocolonialism ("colonialism in a new form"[132]) may have succeeded its colonial progenitor elsewhere, but in Canada it is colonialism that dominates. The seizure of aboriginal lands and resources, the exclusion or peripheralisation of aboriginal nations from their lands, and the creation of justificatory legal, religious, economic and political structures and doctrines to enforce this state of affairs is colonial. Nothing has changed: aboriginal nations remain economically and politically marginalised and deprived of their land and resource bases.

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[130] RCAP, Treaty Making, 1995, at 42-43.

[131] As determined by the United Nations Development Program in 1995, based on various standards and expectations for men's lives. For women, however, Canada ranked 9th.

The colonial entity of contemporary Canada has no need of 'Indians', but it remains firmly squatted on aboriginal lands and cannot survive without them. Effective reassertion of aboriginal jurisdiction spells limitations for federal and provincial governments, and for the corporate interests that those governments have serviced so well to date. It potentially means limited, terminated, or more costly access to natural resources, regulatory restrictions concerning environmental matters, community development and infrastructure, and required engagement with the primarily unskilled aboriginal labour force.

All of these issues are or should be very much part of the calculus of Quebec secession. Quebec, no less than the rest of Canada, exists on the foundation of colonialism. Some indigenous nations (the Inuit, the James Bay Cree, the Montagnais and Naskapi) within the boundaries of the Province of Quebec have suggested they prefer to maintain ties with the colonial devil they know -- Canada -- rather than develop new ones with an emergent state of Quebec. They have expressly said that they would not permit a Quebec state to "bring" indigenous territories with it, but would "remain" with Canada.

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[132] Jack Woddis, Introduction to Neo-Colonialism: The New Imperialism in Asia, Africa & Latin America, International Publishers, New York, 1967 at 11.

Should Quebec declare itself a sovereign state with territorial integrity approximating its current provincial boundaries, without the express agreement of aboriginal nations who find themselves within Quebec, the colonial relationships practiced by Canada may well be replicated in the emergent state of Quebec. Justice for indigenous nations seems to elude settler societies, especially when its practice has strategic and economic implications. Rosemarie Kuptana, speaking for the Inuit of Quebec, suggested that the Inuit may separate from Quebec if it separates from Canada;[133] both the Inuit and the James Bay Cree held separate referenda[134] in conjunction with Quebec's October 30th, 1995 referendum of sovereignty/separation. The Inuit voted 95% and the Cree 96% in favour with an alliance with the state of Canada over a new state of Quebec. The two aboriginal nations control approximately two-thirds of the territory of the province of Quebec. There are ten additional indigenous nations whose territory Quebec has in part or entirely engulfed.[135] David Schneiderman, Director of the Centre for Constitutional Studies in the Faculty of Law at the University of Alberta, has suggested that, in international law, aboriginal nations may have a stronger case than Quebec for self-determination.[136]

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[133] CBC Radio, 5:00 p.m. news, August 21, 1995.

[134] The Inuit referendum was held October 26, 1995; the Cree referendum, on October 24, 1995.

[135] Mary Ellen Turpel, "Does the Road to Quebec Sovereignty Run Through Aboriginal Territory?" Negotiating With a Sovereign Quebec (Daniel Drache and Roberto Perin, eds.) (Lorimer: Toronto, 1992), at 94-95. Hereafter "Does the Road to Quebec Sovereignty Run Through Aboriginal Territory?".

At a minimum, the possibility exists that significant portions of the territory of the province of Quebec may not become part of a nation-state of Quebec. The northern Quebec boundary has been moved twice since 1867, both times by an exercise of federal constitutional power.[137] But even colonial history and law cannot find certainty of the parameters of either New France or the Quebec that joined Confederation.[138]

As Mary Ellen Turpel argues, Quebec's claim to sovereignty under international law on self-determination (and Turpel points out that self-determination is a right of peoples, not of provinces) implies erasure of aboriginal peoples' political status and denial of their own rights to self-determination, and given recent tensions in Quebec-Aboriginal relations at Oka and around the issue of the Great Whale hydro project, the prospect of having this relationship unmediated by the Canadian Crown is "chilling".[139] And again, we see the colonial relationship, predicated on the seizure of the wealth of others, whose existence and claims are minimized, trivialised, or erased. Quebec's path of economic development based on exploitation and export of natural resources is premised on claiming the land and its profitability, while ignoring the question of prior claims to that land or the matter of the present immiseration of those who make the claims. Matthew Coon-Come, Grand Chief of the James Bay Cree, said this of Quebec's James Bay hydro-electric project:

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[136] Interview on CBC Radio, 740 AM, Edmonton, October 24, 1995.

[137] Kent McNeil, "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have", Negotiating With a Sovereign Quebec (Daniel Drache and Roberto Perin, eds.) (Lorimer: Toronto, 1992), at 107.

[138] Ibid at 107-112.

[139] Turpel, "Does the Road to Quebec Sovereignty Run Through Aboriginal Territory?" at 94, 96, and 101.

> It has contaminated our fish with mercury. It has destroyed the spawining grounds. It has destroyed the nesting grounds of the waterfowl. It has displaced and dislocated our people and broken the fabric of our society.[140]

Conclusion: Decolonisation Within

When classical colonial relationships end, the colonisers go home. While some aboriginal liberationists still advance this option,[141] few take it seriously. The settler and increasingly hybrid populations are here to stay. What is not resolved, however, is the appropriate nature of the relationship between aboriginal and immigrant populations, though there is widespread agreement that the status quo, the colonial legacy, is unacceptable.

International law suggests that solutions may be found in the range of realisations of the right of 'peoples' to self-determination,[142] from free association with the surrounding state to secession from it. 'Free association' is just that -- a freely negotiated and terminable organic relationship. It corresponds to aboriginal articulations of the meaning of the historical treaties. However, this association must be based on mutually acceptable settlement of jurisdictional questions, and recognition that indigenous jurisdiction "rests upon an inherent right, and not a revocable grant."[143]

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[140] Cited in Turpel, ibid, at 104.

[141] The 'Boat Argument': a boat at each coast, and immigrant populations may choose a boat and go back to where they 'came from'.

[142] Articles 1 of both the International Covenants on Economic, Social and Cultural Rights, and on Civil and Political Rights. Canada is signatory to both Covenants.

[143] Maivan Clech Lam, "Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination", Cornell International Law Journal, Vol25, No.3, 1992, at 608.

How do we move through decolonisation while reconstituting the historical myth to include aboriginal realities and constructing a contemporary polity that accommodates all its contributors? How do we break with the colonial process? How can Canada -- or a post-secession Quebec -- decolonise while continuing to exist as a nation-state, and while continuing to exist as a racially and culturally diverse 'community of communities'?

The answers lie in facing up to the colonial past, in taking responsibility for it, and in collective commitment to restitution and to a new non-colonial, mutual and negotiated relationship between aboriginal and immigrant peoples. Facing up to the past means owning all of our history, rather than perpetuating the myth of white settlers creating civilisation in uncharted wilderness. Taking responsibility means understanding that the national wealth has been accrued at the expense of aboriginal peoples, in ways that were legislatively mandated by governments acting on non-aboriginal Canada's behalf.

Decolonisation in the Canadian context means engaging in the perpetual work of maintaining relationship, as recommended by the Royal Commission on Aboriginal Peoples, not so that it can be circumscribed and terminated, but so that it can carry us all into the future. This new relationship will provide a framework for the elaboration of a non-colonial form of government, and for the creation of a society in which the history and well-being of some is not secured by obliterating the history and well-being of others. In the words of Manuel and Posluns,

> An integration of free communities and the free exchange of people between those communities according to their talents and temperaments is the only kind of confederation that is not an imperial domination.[144]

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[144] Manuel and Posluns, The Fourth World at 11-12.

It is a vision of hope for a post-colonial Canada. But it is utterly silent on the question of gender relations, of sex and race discrimination, and of the need to address the location of indigenous women in the state of Canada and in indigenous communities. Decolonisation is not entirely libratory for those who live at the nexus of sex, race and class discrimination if it is premised on the gendered power relations between indigenous men and their counterparts controlling the apparatus of governments and the state.

Chapter Two
Background and Foreground

Introduction

The Background is the context over which Foreground events are seen, the taken-for-grantedness of shared assumptions, structures, and processes. In this chapter, the Background includes the contexts of colonisation, oppression, and resistance, as well as the specific issues of the Indian Act's discriminatory provisions, women's resistance, Indian political divisions, Constitutional changes, and the Sawridge court case. The Foreground is the interplay of contemporary events and relationships which occurs on the underpinnings of the Background. The Foreground is what occupies political attention, but it cannot be understood without also understanding how the Background provides the necessary conditions for its occurrence. The Twinn case only occurs because of the constitutional changes of 1982 and the legacy of colonial oppression, especially through the Indian Acts. In chapter one I discussed the historical events structuring colonial relationships in contemporary Canada. In this chapter I trace the bureaucratisation of these relationships and of patriarchal processes through the Indian Acts. I trace the origin and evolution of the Indian Act notion of status, the context and emergence of Indian support for the status provisions, and how these fit with the contemporary constitutional right of self-government. I also trace Indian women's organised resistance to their legislative and political exile, and examine the solidarities with and divergences from the mainstream women's movement.

The Indian Act Continuum

The first two such pieces of legislation, passed August 10, 1850 - "An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury",[1] and "An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada"[2] had no categories of membership.

The Act of August 30, 1851,[3] defined Indian for Lower Canada in inclusive categories including ethnic ("Indian blood"), residency, descent, and women married to Indians and their children. "An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province, and to Amend the Laws Respecting Indians" was passed in 1857.[4]

The first post-Confederation legislation, "An Act providing for the organisation of the Department of the Secretary of State for Canada, and for the management of Indian and Ordnance Lands,[5] was passed May 22, 1868. It referred to "lands reserved for or held in trust for "any tribe, band or body of Indians" and the notion of 'band' as a legal term emerges here. It also defined 'Indian' more narrowly: of "Indian blood"; residence with Indians; maternal or paternal descent from Indians; the descendants of all such persons; and all women legally married to any of these classes of persons, together with their children and descendants. It excluded those who did not fall into these categories from residence on and occupation of Indian lands.

In 1869 "An Act for the gradual enfranchisement of Indians, the better management of Indian Affairs"[6] was passed, and added the patriarchal norm: "Provided always that any Indian woman marrying any other than an Indian, shall cease to be an Indian within the meaning of this Act, nor shall the children issue of such marriage be considered as Indians within the meaning of this Act;" and provided also that women marrying a man from another "tribe, band or body" should become a member of her husband's society so defined.

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[1] "An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury", 13 & 14 Victoria (1850) Cap.74.

[2] "An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada" (1850), 13 & 14 Vict., c.42.

[3] August 30, 1851, 14 & 15 Vict., c. 59.

[4] 20 Victoria (1857).Cap.6 (Canada), 31 Victoria Cap.42.

[5] "An Act providing for the organisation of the Department of the Secretary of State for Canada, and for the management of Indian and Ordnance Lands, (1868), 31 Vict., c. 42.

[6] "An Act for the gradual enfranchisement of Indians, the better management of Indian Affairs, and to extend the provisions of the Act 31st Victoria", Chapter 42 (1969), 32 and 33 Victoria, c.6.

The April 12, 1876 legislation[7] more narrowly defines "Indian" and "band". Instructionally, "Indian" is defined as "First. Any male person of Indian blood reputed to belong to a particular band". Patriarchal measures were fundamental and authoritative. The definitional section continued to illuminate patriarchal legitimacy (patrilineality) within colonial sociological parameters (legitimacy) as determinative of status, and to specify that Indian women "marrying any other than an Indian or a non-treaty Indian shall cease to be an Indian in any respect within the meaning of this Act", and that women marrying men from other "bands" then become members of their husbands' bands. The Act also defined and provided for "enfranchisement" and "reserve", the latter as land "set apart by treaty or otherwise for the use of benefit of or granted to a particular band of Indians, of which the legal title is in the Crown". As with the earlier Acts, it prohibited non-Indians from residency or use of Indian lands, and extends the restrictions on the use of Indian lands. Continuing in the patriarchal mode, the Act specified that release or surrender of Indian lands shall be by assent of a majority of male members of the age of 21 years. Women were to have no political voice over the disposition of these lands, but were expected to accept the shape of their lives decided by men.

The Act was amended again in 1886, 1887, 1906, and 1927, with the next major amendment in 1951,[8] but the status criteria were not amended again until 1985, via the contested C-31 legislation.[9] The relevant portion of the C-31 amendments to the Indian Act changed the status and membership formulae, creating a general register of persons recognised as status Indians by the government, and band registers recognising band members. The C-31 amendments also eliminated the high-profile sexist 12(1)(b) provision stripping Indian women of status for marrying non-status men.

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[7] "An Act to amend and consolidate the laws respecting Indians" (1976), 43 Vict., c.18.

[8] The Indian Act, S.C. 1951, C.29.

[9] Indian Act, R.S.C. 1985, c.27. The Act was again amended in 1988, in order to address a portion of the population seeking reinstatement. For a discussion of the exclusionary effects of the 1869 Act and the implications of the 1985 amendments, see Joyce Green, "Sexual Equality and Indian Government: An Analysis of Bill C-31Amendments to the Indian Act", Native Studies Review 1, No.2, 1985. Hereafter "Sexual Equality and Indian Government".

Over the decades since 1869, section 12(1)(b) had effectively excommunicated Indian women who married anyone other than a status Indian male by terminating their status. The consequences of status termination extended "from marriage to the grave"[10] and included the prohibition on reserve residency and the removal of any benefits that accrue to status Indians, either as residents of reserves or through federal policies.

The Costs of Exclusion

There are several ways to calculate the costs of depriving indigenous nations of a significant number of women and their children. The most obvious and significant cost is the loss of human resources, of family solidarity, and of the contributions of community members. This cost is largely ignored by those who investigate the exclusionary provisions of Indian Act membership. They are difficult to quantify, and they rely on conceptualising women and children as assets rather than liabilities. A second way to calculate cost is to compute the per capita payouts made by the Department of Indian Affairs to women that were disenfranchised. Under the terms of the pre-1985 Indian Acts, women stripped of their status were given a per capita share of their band's resources. As Kathleen Jamieson points out, except for a few bands in Alberta the sum was negligible. By way of example, the average 'cost' of paying out ("buying out", in Linda Trimble's appropriate formulation[11]) these women in the years 1966 to 1977 was $261.80 per person.[12]

The most important cost is that endured by the women and children involuntarily exited from their communities, deprived of the cultural context significant to their identity, and exiled to the tender mercies of a racist, sexist society which saw them as "Indian". The disinherited lost access to government programs for Indians, including education at the primary, secondary and post-secondary levels, health care and prescription drug coverage, housing programs, access to dedicated funds such as the Indian Economic Development Fund, and certain aboriginal and treaty rights.[13] The disinherited literally could not inherit property on reserves, the home of most relatives from whom they could conceivably inherit. Even if widowed, divorced or abandoned, the disinherited could not return home. These are the material losses. The psychological trauma, however, cannot be so easily computed. Jamieson writes:

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[10] Kathleen Jamieson, Indian Women and the Law in Canada: Citizens Minus, Supply and Services, Ottawa, 1978, at 3.

[11] Linda Trimble, personal communication, September 5, 1996.

[12] Kathleen Jamieson, Indian Women and the Law: Citizens Minus, Supply and Services Canada, Ottawa, 1978 at 67. Hereafter Citizens Minus.

> The enfranchised Indian woman and her children find themselves with identity problems, culturally different and often socially rejected by white society, yet they may not participate with family and relatives in the life of their former communities. ... The long term effects ... are profound and impossible to measure.[14]

Indianising Legislated Patriarchy

The policy objectives of the Indian Acts were bureaucratic efficiency of management of populations who were deemed be in a state of tutelage. Effective management was measured not only in the transformation of aboriginal sociological and political practices to conform with Euro-Canadian norms (the policy of assimilation), but also by fiscal restraint. However, it was the bureaucratisation of the political objective of assimilation that produced the impulse of Euro-Canadian conformity in the Indian Acts' membership provisions. The criteria are consistent with and reflective of Canadian norms regarding the legal and social status of women and children. In law, women were not citizens; they were subjects, and the same held true for Indians of both sexes.[15] However, Indian men could perfect their legal capacity by "enfranchising" -- the term used to mean removing the perceived impediments to their citizenship by attaining a set standard of civilization and renouncing their Indian status. Women, however, could never transcend their sex to become competent citizens regardless of their 'racial' origin. They were the property of and under the direction of the relevant patriarch, either father or husband. The Indian Acts replicated this, thanks to bureaucratic and legislative assumptions about what women could and should aspire to.

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[13] Jamieson, ibid at 69-71.

[14] Jamieson, ibid. at 71-72.

[15] See, for example, Sandra Burt, "Legislators, Women and Public Policy", Changing Patterns: Women in Canada (2nd), Sandra Burt, Lorraine Code and Lindsey Dorney, eds., (Toronto: McClelland & Stewart) 1993.

In 1956 the Indian Act was amended so that men did not have to renounce their Indian status -- to enfranchise -- to be citizens. In 1960 Indians were permitted to vote in Canadian elections, and the Canadian Bill of Rights was passed by the Diefenbaker government, proclaiming equality under the law. Still, Indian women continued to be legislatively enfranchised -- with 'enfranchisment' now clearly no longer meaning gaining citizenship status, but only losing their Indian status. Opposition to this, however, was building, and Indian women contesting the discriminatory provisions were forming alliances in the non-Indian Canadian population.[16] For example, Janet Silman documents how the Advisory Council on the Status of Women and the National Action Committee on the Status of Women supported Tobique women's efforts to resist sexist band governments and fight Indian Act sex discrimination.[17]

During the late '60s and early '70s the National Indian Brotherhood, the forefather of the Assembly of First Nations, was emerging as the umbrella lobby organisation for status Indians. The NIB had as a priority the negotiated revision of the entire Indian Act so as to enhance Indian autonomy.[18] In 1969 Jean Chretien, then the Minister for Indian Affairs in the new Trudeau government, floated the government's white paper on Indian Policy, arguing that special status, treaties, and reserves were anomalies that must be eliminated in favour of equality among Canadians.[19] Called "Choosing A Path", it became known simply as the "White Paper" because of its 'white' assumptions, analysis and solutions.[20] It served an unexpected purpose, however, in galvanising the status Indian population behind the NIB.[21] It also left most Indian activists with a bitter taste in regards to state-defined notions of 'equality'. The Indian Association of Alberta, then under the leadership of Harold Cardinal, led the resistance to the White Paper with its Red Paper.[22] The Red Paper refuted the White Paper in its entirety, and called for Indian participation in negotiating the legislative and administrative changes necessary to enhance Indian autonomy and distinctiveness. All of this occurred in a context where the federal government was supposedly negotiating and consulting with Canadian Indians on policy matters and Indian Act revisions.[23] A joint federal government - NIB committee had been struck in 1968 to, among other things, examine Indian Act revision.[24] The NIB strategy was to revise the entire act but refuse any piecemeal amendment.[25] Therefore, amendment of section 12(1)(b) was held hostage to agreement on amendment of the entire Act. The latter agreement was never reached, and eventually the joint federal-NIB committee was abandoned, amidst NIB charges that the federal negotiators had been directed not to negotiate.[26] In sum, pursuing the equality rights of Indian women was not only not a priority of the NIB, but the strategic use of these rights was politically acceptable to the NIB strategists.

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[16] Indeed, Harold Cardinal, then President of the Indian Association of Alberta, notes that 'white' support for status Indians was eroded by the decision of status organisations to oppose Indian Act revision. The Rebirth of Canada's Indians, M.G. Hurtig, Edmonton, 1977, at 112.

[17] Janet Silman, Enough is Enough: Aboriginal Women Speak Out, The Women's Press, Toronto, 1987, at 132. Hereafter Enough is Enough.

[18] George Manuel and Michael Posluns, The Fourth World: An Indian Reality, Collier Macmillan Canada Ltd., Don Mills, Ontario, 1974, at 168. Hereafter The Fourth World.

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[19] Peter MacFarlane, Brotherhood to Nationhood: George Manuel and the Making of the Modern Indian Movement, Between the Lines, Toronto, 1993, at 108-121. Hereafter Brotherhood to Nationhood. George Manuel and Michael Posluns, The Fourth World, at 168.

[20] George Manuel and Michael Posluns, The Fourth World at 169. See also Peter MacFarlane, Brotherhood to Nationhood at 108 - 121.

[21] J. R. Miller, Skyscrapers Hide the Heavens: a History of Indian-White Relations in Canada, University of Toronto Press, Toronto, 1989, at 230 - 232. Hereafter Skyscrapers Hide the Heavens.

[22] The Red Paper, formally entitled Citizens Plus: A Presentation of the Indian Chiefs of Alberta to Right Honourable P.E. Trudeau, Indian Association of Alberta, Edmonton, 1970. Harold Cardinal's view of the federal government's policy intent at the time is contained in his book The Unjust Society, Hurtig Publishers, Edmonton, 1969. The title is a play on then-Prime Minister Pierre Trudeau's invocation of "the just society". See also J.R. Miller, ibid at 230 - 232, and Peter MacFarlane, Brotherhood to Nationhood at 115 - 116.

[23] Peter MacFarlane, Brotherhood to Nationhood at 120.

[24] Harold Cardinal, The Unjust Society at 120-23.

However, outside 'Indian Country' the sexist provisions of the Indian Act were attracting opprobrium, especially from women's equality-seeking organisations. In 1970, the Royal Commission on the Status of Women published its Report, in which it condemned the sexist status provisions of the Indian Act.[27] In 1974, the cases of Lavell and Bedard[28] went to the Supreme Court of Canada, seeking a declaration that the discriminatory status provisions of the Indian Act were offensive to the Canadian Bill of Rights and inoperative to the extent of the inconsistency between them. In a landmark ruling which shocked many, the Supreme Court decided that the Indian Act was not discriminatory, as the Bill of Rights guaranteed equality under the law, and all Indian women were treated equally under the law that applied to them -- the Indian Act. As Ritchie J. wrote in the Lavell decision, "the phrase 'equality before the law' as employed in s.1(b) of the Bill of Rights is to be treated as meaning equality in the administration or application of the law by the law enforcement authorities"[29] (emphasis his).

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[25] Strategy considerations are discussed in Harold Cardinal, The Rebirth of Canada's Indians, Hurtig Publishers, Edmonton, 1977. See also Kathleen Jamieson, Citizens Minus, at 89-90.

[26] Harold Cardinal called the consultative meetings "the purest hypocrisy". The Unjust Society at 123.

[27] Report of the Royal Commission on the Status of Women in Canada, Supply and Services, Ottawa, 1970 at page 238.

[28] Attorney-General v. Lavell and Isaac v. Bedard, SCC [1974] SCR 1349.

[29] A.G. Canada v. Lavell; Isaac et al v. Bedard, (1973), 38 D.L.R. (3rd) 495.

The majority of the intervenors in the case were status Indian organisations, intervening against Lavell and Bedard and for the Indian Act. The charge was led by the Indian Association of Alberta (IAA), which lobbied other provincial Indian organisations and the National Indian Brotherhood to join with it. Indeed, Harold Cardinal, the President of the IAA, chose to use Indian women's rights as a strategic tool in the IAA's relationship with the federal government. Cardinal's articulation of this is breathtaking in its honesty, and warrants replication here.

> We do not want the Indian Act retained because it is a good piece of legislation, it isn't. It is discriminatory from start to finish. But it is a lever in our hands and an embarrassment to the government ... (emphasis mine).[30]

Commenting on the Lavell case a few years later, he said:

> Another valid concern was that if the women were successful in their suits, our reserves would be opened for settlement by white men ... Our alarm, which led to our decision to oppose the two women, was based on our belief that if the Bill of Rights knocked out the legal basis for the Indian Act, it would at the same time knock out all legal basis for the special status of Indians."[31]

Remember that all of this occurred in a dismal political climate between Ottawa and Indians, characterised by federal manipulation of public opinion in order to tell Canadians that it had consulted with Indians in order to draft appropriate policy. In fact, the illusion of consultation was intended to legitimise the termination of rights claims, reserves, special status, and designated programs under the rhetoric of equality. Indian paranoia, then, is not without foundation, though the strategic hostage-taking of Indian women's rights is without justification.

In what is one of the earliest explicit articulations of the priorisation of assumably gender-neutral Indian rights over women's rights, Cardinal wrote that "it was not the rights of women at stake" but the possibility that an affirmative legal decision could "wipe out the

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[30] Harold Cardinal, The Unjust Society, at 140.

[31] Harold Cardinal, The Rebirth of Canada's Indians, Hurtig, Edmonton, 1977, at 109-110.

Indian Act and remove whatever legal basis we had for our treaties".[32] Not coincidentally, these organisations were almost entirely male dominated, and that has not changed much in the intervening years.

During the 1960s and 1970s, Harold Cardinal was one of the most influential and high-profile Indian politicians. His writings show the cutting edge of strategy and analysis at that time. It is clear that in the honourable fight against colonial oppression, Cardinal both lacked gender analysis and advocated using Indian women's rights strategically to lever concessions from the federal government. But nowhere in this less noble strategy is there any attempt to dignify it with invocation of 'tradition', and in this way it is markedly different than the strategic misuse of tradition to advance the Twinn[33] legal arguments in 1995.

Following the disastrous Lavell case, Indian Rights for Indian Women (IRIW), a grassroots aboriginal organisation originating in Alberta and dedicated exclusively to removing legislative discrimination from Indian women. made three requests of the federal government. The first was an end to the eviction of women and children from reserves. The second was the suspension of enforcement of 12(1)(b) until the Indian Act was revised in its entirety. The third was the representation of Indian women's organizations in the joint federal government-National Indian Brotherhood negotiations on Indian Act revision. All three requests were denied.[34]

Harold Cardinal argued that "whatever injustices an Indian woman faces under the current provisions of the Indian Act can best be rectified when the Indian Act is amended",[35] indicating that strategic interests were driving the status Indian organisations' stances on women's rights as impugned by the Act. In fact, women's rights held no interest for the NIB or the IAA. It was the wholesale overhaul of the Act that was considered important.

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[32] Ibid.

[33] Sawridge Band et. al v. Canada, [1995] (FC-Trial). Also cited as Twinn, for the plaintiff representing the Sawridge Band.

[34] Jamieson, Citizens Minus, at 92.

[35] Harold Cardinal, The Rebirth of Canada's Indians at 112.

This raises an issue of representation, whether malestream organisations can adequately represent women, and whether, or how, women's organisations can or should work with them to advance an inclusive agenda. Nor is malestream exclusion of women a particularly aboriginal phenomenon, The federal, provincial and territorial governments are predominantly male and homogeneous within that category. This easy assumption about the representative capacity of unrepresentative governments was demonstrated recently when Minister of Indian Affairs Ron Irwin met in Winnipeg with the Assembly of Manitoba Chiefs (AMC), to talk about aboriginal control of education as a governance issue.[36] Neither party seemed concerned about the absence of women at the negotiating table, though some aboriginal women objected. One, Kathy Mallett, suggested the AMC seemed to be following a 'white male model of government'.[37]

It is also interesting that the primary opposition to Indian women fighting the Indian Act, both in the 1970s and after 1985, was in Alberta, and the plaintiff bands in Sawridge are all Alberta based. Indeed, it is in Alberta that 'C-31' women have received death threats.[38] At the same time, it is worth noting that several politically active aboriginal women who have contested male-dominated aboriginal councils and organisations have spoken of being intimidated and subjected to threats of violence.[39]

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[36] Patricia Robertson, "White Man's Ways Won't Do: Native Women Critical of Closed-Door Process for Self-Government", Herizons, Vol.10, No.3, Summer 1996.

[37] Ibid at 7.

[38] The late Jenny Margetts, President of Indian Rights for Indian Women, said: "But even members of my own band, Saddle Lake, said they would shoot us if we moved back". Joyce Green, "Sexual Equality and Indian Government: An Analysis of Bill C-31 Amendments to the Indian Act", Native Studies Review 1, No.2 (1985), at 95.

[39] See "Women Who Own Themselves", Report of the Women of the Metis Nation to the Royal Commission on Aboriginal Peoples, August 30, 1993, at 10 ("we get death threats"), 28, and 34-39, especially at 35, quoting Mary Weigers, "I have been threatened with having my Metis card withdrawn for my women's political activism" and at 39, quoting Rhonda Johnson, "I was called into the office of the President of the Pacific Metis Federation and told by the President, Norm Evans, that I had 'no business organising and speaking as a woman'"; Joyce Green, "Constitutionalising the Patriarchy", at 118; especially quoting Nellie Carlson: "our lives were threatened, we were followed everywhere we went; our phones

Following the Supreme Court's dismissal of the Lavell case, opponents of the Indian Act's sex discrimination chose as their next avenue of opposition the international arena. Canada was signatory to the International Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights. Canada had also signed on to the Protocol, which binds signatory nations to accept citizen appeal to the United Nations Human Rights Commission upon exhausting all domestic courts. In 1975, Sandra Lovelace, a Maliseet Indian who had lost status upon marriage, complained to the Commission that Canada was in violation of the Covenants because of the Indian Act's sexist sections and their consequences for women. Initially, it seemed that once again the law would be read so as to permit state-sanctioned discrimination: the legal presumption against retroactivity was held to prevent a finding that Canada was perpetuating sex discrimination against Lovelace because her marriage predated the ratification of the Covenants. However, the court found Canada in violation of Section 27 of the Covenant of Civil and Political Rights, which guarantees everyone the right to enjoy her culture in her community, because the Indian Act denied her the right to enjoy her culture, profess and practice her religion, and use her language.[40] With this decision, international disapprobation was joined with domestic opposition to the Indian Act's discrimination against Indian women.

Aboriginal Feminism

In 1978, Kathleen Jamieson's foundational work[41] on this subject was published under the joint auspices of the Advisory Council on the Status of Women, a largely

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were tapped -- that's how Indian women were treated for speaking out"; and Janet Silman, Enough is Enough, a partial list of references at 93, 124-25, and at 126, quoting Glenna Perley describing how activist women were branded as "the shit-disturbers, radicals, white-washed, women's lib", 128, and at 129 Bet-te Paul recounting the threat "we're going to kill your kids".

[40] Re Sandra Lovelace, United Nations Human Rights Commission 6-50 M 215-51 CANA.

[41] Indian Women and the Law in Canada: Citizens Minus, Supply and Services, Ottawa, 1978.

mainstream government-sponsored and controlled advisory body, and Indian Rights for Indian Women. This alliance was evidence of the solidarity Indian women were finding in the non-Indian women's community, despite the complicity of the latter with the racist history and practices of the Canadian state towards aboriginal peoples. The Federal Advisory Council on the Status of Women and the National Action Committee on the Status of Women (NAC) stood in solidarity with, in the 1970s, Indian Rights for Indian Women, and the NAC, later, with the Native Women's Association of Canada (NWAC).[42] The Jamieson study raised public awareness of the Indian Act and of the lack of convergence between Indian women's rights and the not so gender neutral Indian rights advanced by the male-dominated status organisations. Again, feminist solidarity was amply demonstrated during the hearings of the Special Joint Committee of the Senate and House of Commons on the Constitution[43] just prior to patriation. The Canadian Advisory Council on the Status of Women[44], the Catholic Women's League of Canada[45], Indian Rights for Indian Women[46], the Women's Research Centre and Vancouver Status of Women[47], the Native Women's Association of Canada[48], the Progressive Conservative Women's Association of Cornwall and Area[49], the NAC[50], the National Council of Jewish Women of Canada[51], and the National Association of Women and the Law[52] all lobbied for the constitutionally-guaranteed equality of Indian rights for Indian men and women, most naming the Indian Act's sexist membership criteria as evidence of the need. Sisterhood[53] may not be enough to eliminate all forms of oppression, including those between sisters[54], but it served then to profile the issue and lend political support to activists, and to build bridges and solidarity between movements.

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[42] Jamieson, Citizens Minus, at 89-90, and Green, "Constitutionalising the Patriarchy".

[43] Special Joint Committee of the Senate and House of Commons on the Constitution, 32nd Parliament, 1st Session.

[44] CACSW Brief November 18, 1980, File RG 14 ACCE 1990-91/119, Box 59, Wallet 3, wants aboriginal and treaty rights guaranteed to native men and women instead of native peoples. CACSW also called for the positive right to equality. Again, in a February 5, 1981 letter from Acting CACSW President Lucie Pepin to Jean Chretien, Minister of Justice, Pepin warns that the then draft of the Charter "still fails to specify that the rights and freedoms guaranteed to aboriginal peoples must pertain equally to native men and women".

[45] The Catholic Women's League of Canada, "Canada and its Future -- a New Constitution", a Brief to the Prime Minister of Canada and the Minister of Justice, November 1980, expresses concern for native rights at page 15 and for Indian women who marry non-Indians to regain and retain their Indian status at page 16.

[46] Indian Rights for Indian Women, "Constitutional Committee", December 2, 1980.

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[47] Women's Research Centre and Vancouver Status of Women Joint Presentation to the Senate and House of Commons Special Joint Committee on the Constitution of Canada, Vancouver, December 1980, supports equal rights for native women.

[48] Native Women's Association of Canada Brief to the Special Joint Committee of the Senate and the House of Commons on the Constitution, December 2, 1980, arguing that native women should have equal access to and participation in decision-making processes and be protected in law against discrimination.

[49] Progressive Conservative Women's Association of Cornwall and Area letter, November 16, 1980, pledging support for native rights and demanding equal rights for Indian women.

[50] National Action Committee on the Status of Women Presentation to the Special Joint Committee of the Senate and the House of Commons on the Constitution, November 20, 1980, calls for constitutional guarantees of equality before the law to prevent Lavell and Bedard-like judicial decisions, for entrenchment of native rights with the explicit proviso that they be guaranteed equally to men and women.

[51] National Council of Jewish Women of Canada Memorandum to the Senate and House of Commons Special Joint Committee on the Constitution of Canada, December 3, 1980, stating "our long-held position in favour of equal rights for native men and women, and our opposition to the present Indian Act which denies to Indian women the rights which Indian men have" and calling for constitutional remedy of this, at page 2.

[52] National Association of Women and the Law, "Women's Human Right to Equality: A Promise Unfulfilled", submission to the Special Joint Committee on the Constitution, November 1980, calls for equality before and under the law and for equality of Indian rights between Indian men and women.

[53] I use here Mary Daly's definition of sisterhood: "an authentic bonding of women on a wide scale for our own liberation". Mary Daly, Beyond God the Father: Toward a Philosophy of Women's Liberation, Beacon Press, Boston, 1973, at 8.

The growth of Indian women's opposition to both the Indian Act's status provisions, and the lack of support from and the rise of resistance from status organisations, band councils and band communities, germinated an aboriginal feminist consciousness. This consciousness had some commonality with non-aboriginal feminism -- the analysis of women's subordination by men, for example -- but differed in some critical ways, by including the consciousness and the experience of those who had endured colonisation and the forms of exploitation, racism and oppression that flowed from that process. As I discussed in Chapter One, colonisation had been facilitated by largely imagined and instrumental 'racial' indicators that disguised how those constructing both the role of coloniser and colonised were those in power. In Canada, this was white power, it was male power, and it was manifested by assumptions about and practices of cultural superiority and developmental inevitability that officially obliterated the visions of those who were subordinated.

Aboriginal feminism arises from an experience of racial as well as gender subordination and the intersecting experiences create alliances across 'race' boundaries and across 'gender' boundaries.[55] That is, aboriginal women understand the experience of aboriginal men, and share the desire to resist colonial oppression in favour of creating possibility for authentic aboriginal political and social expression. This reality makes feminist activism fraught for many aboriginal women, who are conflicted by the very real contradictions between and simultaneous experiences of race and sex oppression. This conflict is used as a tool by some to restrain women from internal critique, for by engaging in it, they can be criticized for undermining the libratory efforts of the status organisations, or for behaving in 'un-traditional' ways, or for making alliances with the race enemy, and so on.[56] (Nor is this experience unique to aboriginal women.[57])

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[54] And who are the sisters? Daly says "Sisterhood is the bonding of those who are oppressed by definition." Ibid at 59.

[55] For example, the Native Women's Association of Canada insisted on combining the right of self-government with women's resolutions for gender equality, including elimination of section 12(1)(b), in a national women's 1981 conference organised by and for women, to secure equality rights in the new constitution. Penney Kome, The Taking of Twenty-Eight:

Showing that there are a range of experiences and analyses of sexism among aboriginal women, some witnesses gave evidence to the Royal Commission on Aboriginal Peoples that women's autonomy and participation were better advanced with the incorporation of certain forms of western governmental practices, especially where these are designed with the participation of the people concerned. Others, however, contended that

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Women Challenge the Constitution, The Women's Press, Toronto, 1983, at 58. Hereafter The Taking of Twenty-Eight.

[56] For a discussion of similar experience of women in Pauktuutit, the Inuit women's organisation, see Martha Flaherty, "Inuit Women: Equality and Leadership", Canadian Woman Studies Vol.14, No.4, Fall 1994; for a discussion of similar experience of Indian women, see Joyce Green, "Constitutionalising the Patriarchy".

[57] For example, Linda Williams remarks that "there was a price to pay for considering yourself a feminist in the black community. I turned off a lot of students, particularly black male students, who said that I was dividing the black community by even raising issues of women's rights." Heidi Hartmann, Ellen Bravo, Charlotte Bunch, Nancy Hartsock, Roberta Spalter-Roth, Linda Williams, and Maria Blanco, "Bringing Together Feminist Theory and Practice: A Collective Interview", Signs, Vol.21, No.4, Summer 1996, at 920-21.

women's status had deteriorated with western practices, and that particularly women's disempowerment was attributable to the Indian Act.[58]

Aboriginal women's organisations have frequently invoked tradition and cultural integrity as important referents for political change from imposed colonial models. These are not women searching for ideologies with which to undermine indigenous cultural and political viability. Rather, they are diagnosing the dysfunctional consequences of colonisation and prescribing socio-political transformation in order to make that viability possible. Typically, these women's organisations insist that treating women, elders, and children with respect is an essential part of this objective. The importance of culture and of the family is always invoked. Pauktuutit, the Inuit women's organisation, provides a useful example of this.

> While Inuit women fully support and need self-governing structures at the regional level, and they want these recognized and protected in the Canadian Constitution, Inuit women also need to see and feel that they are self-determining at the community level.[59]

Pauktuutit has worked to ensure that Inuit women's vision of self-government is part of the process creating northern governments.[60] Pauktuutit envisions communities that could be safe; that is, free of alcohol, suicide and sexual abuse.[61] These communities would have an adequate financial base, Inuit professionals, cultural pride, the Inuktitut language and education, and would provide the infrastructure for economic and community life and for service delivery.[62] Pauktuutit emphasised the importance of Inuit culture, of personal self-reliance, and of men learning "to talk about things".[63] This is hardly the recipe for radical western individualism, but Pauktuutit nevertheless has had to reply to those who make the charge that women's voices raising political issues that include women, and who identify male oppression, are agents of cultural destruction. Martha Flaherty has responded: "To those men who believe that Pauktuutit is trying to take their rights away, I would say that equality never diminishes anyone."[64] This is an indicator of how profound the depth of male resistance to women's activism is. The Inuit, unlike other aboriginal peoples, have had a woman leader (Rosemarie Kuptana) of their 'mainstream' political organisation, the Inuit Taparisat of Canada; and another woman, Mary Simon, is a past leader of the international Inuit Circumpolar Conference. Additionally, Inuvialuit Nellie Cournoyea was leader of the Government of the Northwest Territories. That is, male resistance to women in politics is apparently less in Inuit society than elsewhere. Nevertheless, some Inuit men, like some men elsewhere, insist on equating women's equality with the subordination of men, undermining the family, and destabilising society.

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[58] Royal Commission on Aboriginal Peoples, Restructuring the Relationship, Vol.2, Supply and Services Canada, 1996, at 124-25.

[59] Pauktuutit, "Inuit Women and Self-Government", Canadian Women Studies Vol.14, No.4, 1994, at 112.

[60] Ibid.

[61] Ibid at 113.

Organisations furthering what may be understood as feminist objectives by furthering women's specific socially-located issues as well as equality goals include Pauktuutit, the Inuit women's organisation; the now-defunct Indian Rights for Indian Women; the Native Women's Association of Canada (NWAC), whose membership is primarily Indian women; and the National Metis Women of Canada (NMWC). While the word 'feminist' is seldom used and often avoided,[65] it is in the goals and in the analysis of women's social condition that consonance with feminism may be found.[66] These organisations seek the inclusion of women's voices in processes and institutions of governance, and name the exclusions. Virtually all ground their agenda in the desire to be culturally authentic, to protect the indigenous family, to heal community and individual wounds, and to end violence in its myriad forms. But for many, the priorisation of race oppression through colonial practices outweighs gender oppression.[67] This view is shared with some indigenous women in other settler states.[68]

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[62] Ibid.

[63] Ibid.

[64] Martha Flaherty, "Inuit Women: Equality and Leadership", Canadian Women Studies Vol.14, No.4, 1994.

[65] See, for example, Patricia Monture-Angus, "Some would call it Aboriginal feminism but I have no use for a label that has no meaning for me." Thunder in my Soul: A Mohawk Woman Speaks, Fernwood Publishing, Halifax, Nova Scotia, 1995, at 177. Hereafter Thunder in My Soul.

The Feminist Genesis of Bill C-31

Still, it would be impossible not to recognise that women, organised to support women's rights, (which is to say feminists) were primarily responsible for the federal government's largely instrumental conversion to the wisdom of sexual equality in the Indian Act, not on the road to Damascus, but on the path to implementation of the Charter of Rights and Freedoms. Aboriginal women's organisations and individual activists had been fighting 12(1)(b) application for decades. They were joined by mainstream women's organisations and initiatives, most notably at first in the recommendations of the Royal Commission on the Status of Women[69], but later, and more meaningfully, by the National Action Committee on the Status of Women in its efforts, with other activists known as the "Ad Hockers", in the fight for including women's rights in section 28 of the Charter.[70] The efforts of aboriginal and non-aboriginal women around issues of women's equality were driven by ambivalent experience with the state.[71] As Penney Kome observes, "the equality clause of the 1960 Bill of Rights had never been interpreted to women's benefit".[72] Indeed, the national coalition of women who fought patriarchal governments from 1979 through 1981 was driven by the collective realisation that the human rights of women were seldom acknowledged and less often advanced by the state, and so insisted that the Charter include them precisely to require government attention.[73]

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[66] Joyce Green, "Constitutionalising the Patriarchy", at 111.

[67] Winona Stevenson, quoted in Monture-Angus, Thunder in My Soul, at 231.

[68] For example, Haunani-Kay Trask writes of her political evolution from feminist consciousness to a rejection of American mainstream feminism in favour of cultural nationalism and anti-colonialism. She argues that "the answers to the specifics of our women's oppression reside in our people's collective achievement of the larger goal of Hawaiian self-government, not in an exclusive feminist agenda. ... Issues specific to women still inform our identity as Native women leaders, but our language and our organizing are framed within our own cultural terms, not within feminist American terms." Feminism and Indigenous Hawaiian Nationalism", Signs, Vol.21, No.4, Summer 1996, at 910.

[69] Report of the Royal Commission on the Status of Women in Canada, Supply and Services, Ottawa, 1970, at page 238.

The success of this lobby is witnessed in sections 15 and 28 of the Charter, sections included reluctantly by the First Ministers who had the constitutional power to approve or reject the constitutional proposals that were adopted in 1982. And it is the consequence of these sections that forced the federal government to finally grapple with the discriminatory status provisions, for, had it not done so, there is little doubt that a Supreme Court challenge would have obtained a decision that the Indian Act was inoperative to the extent of its inconsistency with the Charter.

Objectives of the C-31 Amendments to the Indian Act

The passage of C-31 on June 28, 1985, and its retroactive proclamation to April 17, 1985, was intended to bring a federal statute, the Indian Act, into compliance with the Charter of Rights and Freedoms, and in particular, with Section 15, guaranteeing rights equally to men and women. The implementation of Section 15 was delayed till April 17, 1985, in order to permit governments to amend all of their discriminatory legislation and so avoid constitutional challenges to it. Had there been a constitutional challenge, however, it is virtually certain that the Indian Act would have been found to be inoperative to the extent of its inconsistency with the Charter guarantee of gender equality.

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[70] See, for example, Penney Kome, The Taking of Twenty-Eight, at 58.

[71] I take David Schneiderman's point on this, to the effect that women and other subordinated groups both endure the state's subordinating pressures and seek their alleviation by the state and its apparatus. Personal communication, April 18, 1997.

[72] Ibid at 29.

[73] Ibid. Also, see footnotes 44 to 53, which document part of women's advocacy during this historic period.

The most significant Indian Act amendment was the removal of section 12(1)(b). The C-31 amendments were intended:

1. To provide for non-discriminatory treatment of the status and membership rights of status Indian men and women registered under the Act.

2. To modify the historic Indian Act connection between Indian status and entitlement to band membership.

3. To repeal the provision that stripped women of status upon marriage to non-status men.

4. To broaden the definition of 'child' to include children adopted in accordance with Indian custom.

5. To grant bands the statutory power to control of their own membership as part of the federal policy to promote self-government.[74]

The amendments are obviously intended not only to remedy the federal government's historic discrimination against Indian women, but to offer an olive branch to bands in the form of "the statutory power to control ... their own membership"[75] as an expression of self-government.

Since the enactment of the C-31 amendments in June 1985, until 1993, over 100,000 people have applied to have status either returned or granted.[76] Only a fraction of those acquiring status have also acquired band membership, and fewer still have been reintegrated in their communities of origin. In John Gartrell's survey[77] of 218 Alberta C-31 reinstatees (of a universe of 626), 36% held band membership, though only 8% were reserve residents, and "some have not applied because they were discouraged from doing so"[78]. Thirty-nine percent grew up on a reserve.[79] Gartrell writes that "Those who had lived on the reserve had maintained a closer connection to the reserve and to the band (and) ... were significantly more likely to think that band membership was important."[80] Seventy-nine percent agreed that band membership was personally very important; 70% agreed that a voice in band decisions was important; 83% agreed that acceptance by bands was important; 87% agreed that passing their heritage on to their children was important.[81] In a 1990 survey[82], the most common reasons cited for wanting status were personal identity and cultural heritage, and a majority were interested in reserve residency. These data suggests that C-31 reinstatees identify strongly with their cultural community and are committed to being a meaningful part of that community. The Gartrell survey data also indicate that the reinstatees are not strangers to Indian communities: 46% visited their reserve at least every two months, and 74% within a year.[83] Eighty-seven percent communicate regularly with reserve residents, and 35% keep briefed on band affairs.[84] This suggests C-31 reinstatees are significantly connected to their band communities.

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[74] [74]Defendant's Memorandum at pages 11-13, citing the testimony of Sandra Ginnish, Registrar for the Department of Indian Affairs.

[75] Ibid.

[76] John Gartrell, "The Social Impact of Bill C-31 in Alberta", Prepared for the Native Council of Canada (Alberta), August 19, 1993. Hereafter "The Social Impact of Bill C-31".

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[77] John Gartrell, "The Social Impact of Bill C-31 in Alberta", August 19, 1993.

[78] Ibid at 14.

[79] Ibid.

[80] Ibid at 14.

[81] Ibid at 7.

[82] Canadian Facts, Spring 1990, with n=2,032. Cited by John Gartrell, "The Social Impact of Bill C-31 In Alberta", August 19, 1993, at 1.

[83] John Gartrell, "The Social Impact of Bill C-31 in Alberta", August 19, 1993, at 8.

[84] Ibid at 9.

Sixty percent agreed that "C-31 Indians" suffered from discrimination from the reserve community, with 21% reporting harassment because of their C-31 status, 5% reporting threats and 3% reporting violence.[85] Overwhelmingly, then, C-31 registrants are identified and discriminated against as such.[86]

The survey found no significant correlation between aboriginal language retention and band membership. This suggests that the efforts of some bands to place linguistic and cultural criteria in band membership codes is in fact intended to frustrate C-31 reinstatees from becoming band members, rather than to guarantee cultural integrity. If the data are consistent, then current band members will be no more competent in this regard than their C-31 counterparts. It is reasonable to conclude that band membership or citizenship codes are being designed by some bands as filters to exclude precisely those persons that the Indian Act amendments are designed to include, and that the purpose is a set of racial/ist and sexist criteria whose origins may be colonial but may not be only colonial, and whose practice constitutes a prima facie violation of both women's Charter rights and women's internationally recognised human rights.

The plaintiffs in Twinn argued that, as a result of C-31, bands faced a 15% population increase because as of June 1990, DIAND had received 133,000 applications and had processed 70,000 of those.[87]

> If you look at the ... C-31 total population expressed as a percentage of the total population, my Lord, it's about 14.5 percent at that time with more registrations to go. That means, my Lord, without even looking at any band in particular, you can say the national average is almost 15 percent population increase or potential population increase. ... (and then by 1993) ... around 95,000 registrations had by then been accomplished".[88]

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[85] Ibid at 9-10.

[86] Sally Weaver, "First Nations Women and Government Policy, 1970-92: Discrimination and Conflict", in Sandra Burt et. al, Changing Patterns: Women in Canada (2nd), McClelland & Stewart, Toronto, 1993.

[87] Court Transcript recorded by David Mackay, C.S.R., R.P.R., Court File No. T-66-86, April 25, 1994, Vol.79.

[88] Ibid.

However impressive the numbers look, the vast majority of reinstated Indians have not returned to reserve communities. For some, reserve residence is not an option because of personal and professional commitments off-reserve. More problematically, for others returning to reserve communities is complicated by exclusionary band membership codes which impose racial, racist criteria, discrimination as "C-31s", and threats of violence. While the federal dollars and programs designed to ameliorate the impact of reinstatement on bands are undoubtedly too little, too late, and lend themselves to further community divisions based on entitlements to different pots of money,[89] it is not the financial issue that looms largest in band opposition to reinstatement. Rather, it is a complex, multi-layered opposition composed of: resistance to what is seen as further federal imposition; claims to self-government, which logically includes citizenship/membership control; and less nobly, of racism and sexism, in support of racialised concepts of what a genuine member of a particular First Nation is; together with indigenous and colonial patriarchal resistance to women's political and social agency.

While opposition to women retaining status without regard to their spouses' status has remained constant, the rationale has changed. In the '70s, Harold Cardinal and others were quite frank about sacrificing some Indian women's rights for the strategy of preserving what was seen as legislative recognition by Canada of Indian rights through the instrument of the Indian Act. In the late 1980s and 1990s, however, what was once a political strategy was re-presented as a constitutional right and an aboriginal tradition, though a reading of the

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[89] Joyce Green, "Sexual Equality and Indian Government: An Analysis of Bill C-31 Amendments to the Indian Act", Native Studies Review 1, No.2 (1985), at 86-87.

Sawridge case can lead to similar conclusions of instrumental tactics used by the plaintiff bands. What is troubling is the way in which both aboriginal 'tradition' and the racist, sexist Indian Acts become mythified in the plaintiffs' arguments in Sawridge, and in political debate generally. The re-construction of strategy as tradition, and tradition as beyond critique except by dupes of the individualist white oppressor, dismisses aboriginal women's objections to sex discrimination and to male violence against women in aboriginal communities and in aboriginal politics.

It is worth noting the fear of white male intrusion and its potentially destabilising effect on reserve societies that Cardinal expressed in 1970. It is further evidence of the recognition of and acquiescence to patriarchy. Women were not threatening (at least as long as they confined themselves to the roles ascribed by patriarchy). Men, however, were understood to be competitors, and ones with an unfair advantage, that of race. The power relations between Indian men and white men drove the resistance of Indian men to Indian women's equality, at the same time that the power relations attached to gender drove their solidarity with white men at least in regard to women. As Kathleen Jamieson wrote in 1978,

> The implication of inevitable white male superiority held by most non-Indians is still an integral premise of the same much iterated argument, that if Indian women are allowed to retain Indian status on marrying white men, these men will take over the reserve.[90]

This same fear of white male intrusion was expressed by witnesses for the plaintiff in Sawridge fifteen years later. Importantly, the Sawridge claim included assertion of the right of constitutionally recognized self-government and the right to practice sex-discriminatory customs as components of self-governance.

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[90] Jamieson, Citizens Minus, at 87.

Self-Government

It is because of the right of self-determination that attention is paid to the rights of significant collectivities to preserve that which they need for survival. Self-determination is a challenging right to articulate and to implement, as it must be claimed and practised within the realpolitik. The world is organised into states, and increasingly, states are interdependent because of the globalisation of capital and the consequent construction of the global economy. However, there is nothing natural or organic about states: they exist because of historic power relations that permitted some to become powerful at the expense of others. Self-determination is an expression of the will and the right to survive, by nations overwhelmed by states who now hold power.

Indigenous political activism around self-government and aboriginal rights initiatives are assertions of nationhood,[91] though this is discounted by state theorists as 'tribalism'.[92] Increasingly, there is little congruity between socio-political nations and states. Citizenship in the state overlays citizenship or membership in tribes, nations, and other social organisations that are subordinate to the state. For aboriginal nations, this relationship is structured by the historic process of colonisation and then of repressive domination by the colonisers. The consequence is that aboriginal nations find themselves within the state of

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[91] Gerald R. Alfred, Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism, Oxford University Press, 1995, at 10-11. Hereafter Heeding the Voices of Our Ancestors.

[92] Ibid at 11.

Canada, though without their consent. In what Gerald Alfred calls "the illegitimacy of colonial political structures for constructing co-existence"[93] they find their relationships with each other and with the state structured by the state. Moreover, they find their political structures subverted and controlled by the state, and their cultural integrity and economic base have been eroded by the state. The state exists because of its domination of aboriginal nations, and so this relationship will never be legitimate, it will only be tolerated. The parameters of toleration are those of politics: the art not only of the possible, but of survival.

Nationalism, according to Gerald Alfred, is composed of "a relatively stable core which endures and peripheral elements that are easily adapted or manipulated to accommodate the demands of a particular political environment."[94] It is the problem of determining what is central to authentic indigenous national integrity, and what is an adaptation to the exigencies of survival in the colonial state and in the contemporary global political and economic environment~~, that~~ plagues the question of membership/citizenship today.[95]

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[93] Ibid at 7.

[94] Ibid at 14.

[95] This question was addressed by the Supreme Court of Canada, unsatisfactorily, in my view, in R. v. Van der Peet, S.C.C. No.23803, [1996] S.C.J. No.77, in which the S.C.C. fixes authentic aboriginal practices giving rise to rights at a pre-colonial contact moment. This suggests there can be no contemporary aboriginal socio-cultural practices, but only contemporary repetition of pre-colonial practices. This, in turn, denies authenticity to changed practices, syncretic traditions, and contemporary ways of being aboriginal.

The objective of nationalism is survival as a viable and authentic entity, encoded in traditions.[96] Traditions, then, are the practices of Be-ing[97] that define and perpetuate authentic survival. It is in pursuit of survival that an aboriginal right of self-determination is grounded. And it is as part of this right that aboriginal nations in all their variety anticipate regulating internal membership, or citizenship. But it is as bands, constructed and controlled by the federal Indian Act, that fragments of aboriginal nations seek to determine membership in terms of band membership and reserve residency.

Self-government has been the language used by both indigenous and mainstream politicians, though not always with the same meaning. Self-government emerged as the term of choice for Indian leaders in the 1970s in its contestation of Canada's political and economic domination of bands. It was quickly adopted by Inuit, non-status and Metis constituencies and expanded to mean a libratory evolution of Canadian-indigenous relations. Within the status Indian community and as articulated by the Assembly of First Nations, the term most often is used in reference to the political autonomy of band councils on a reserve land base, and to the constitutional amendment process that established section 35 in the Constitution Act 1982 and has debated its content since then. Finally, opinion-leaders in academia and the media, and federal and provincial governments, use the term to refer to a variety of political initiatives of both orders of government, though predominantly the federal government, to expand the legislative options, typically for reserve communities. It can generally be viewed as self-administration, as it is effectively the devolution of legislative or program authority from the federal government, and sometimes from the provincial government through tripartite agreements, to band governments. In this last usage it can also be seen as the co-optation of libratory language in the service of the constitutional status quo. Self-government, then, is a politically laden term with indeterminate parameters at present.

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[96] Ibid at 12.

[97] I like Mary Daly's formulation of being as the verb Be-ing; the immediate experience and process of existence. "The Naming of Be-ing as Verb -- as intransitive Verb that does not require an "object" -- expresses an Other way of understanding ultimate/intimate reality." Mary Daly, Beyond God the Father: Toward a Philosophy of Women's Liberation, Beacon Press, Boston, 1973, at xvii; and, "Courage to be is the key to the revelatory power of the feminist revolution", Ibid at 24. Applying the Daly formulation to aboriginal Be-ing foregrounds the courageous insistence on the process of authentic contemporary existence.

Bands and individuals have been contesting Canadian federal and provincial regulation of matters which are arguably within the parameters of self-government, part of the section 35 Constitution Act 1982 "existing aboriginal and treaty rights". Since the Sparrow case, courts have been required to consider traditional practices as evidence of aboriginal rights, and to measure the regulatory limitation of identified rights against the Sparrow test of least possible interference with aboriginal rights, preferably in ways negotiated with those affected.[98] Twinn et al. had advanced the proposition in Sawridge that exclusion of women who 'married out', articulated as the traditional law that 'woman follows man', was evidence of traditional practice which demonstrates an aboriginal right which supersedes the Charter equality guarantees and therefore, federal legislation that constrains the right to define band membership. Tradition, then, is a potentially potent argument in invoking rights claims that place a very high onus on the state if it wishes to legislate in ways that interfere with such rights.[99]

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[98] R. v. Sparrow, [1990] 1 S.C.R.

Under the Chretien Liberals elected in 1993, Minister of Indian and Northern Affairs Ron Irwin has floated a "self-government" policy package variously referred to as a proposal or as a DIAND policy. The policy has been condemned by the Assembly of First Nations for its content and for the process by which it is being pursued. The content is viewed as substantially less than the central components agreed to in the Charlottetown Accord, while the process of negotiation on a band-by-band basis is viewed as a divide and conquer strategy designed to undermine the legitimacy of the national lobby organization, the AFN, and status Indian solidarity.

The Irwin policy document makes it clear that the inherent right is to be exercised within the existing federal structure, and within the parameters of the Canadian constitution, including the Charter of Rights and Freedoms. This is problematic for some of the AFN chiefs, who reject incorporation into the Canadian state without their consent and in violation of their sovereignty. That is, they reject the imposition of colonial law. For example, Bill Erasmus, Chief of the Dene Nation, has said "We don't want to be part of the Canadian

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[99] Indeed, this argument was brought to the Supreme Court recently in R. v Pamajewon, S.C.C. No. 24596, [1996] S.C.J. No. 20, in which two Manitoba bands contended that the provincial government could not regulate gaming on their reserves, because gaming (bingo halls, in this instance) was a traditional activity that was part of the section 35 right of self-government. However, the Supreme Court decided that the plaintiffs had not established that gaming was in fact a practice traditionally regulated by the communities in question, and so found that there was no section 35 right to control gaming. Reported by CBC Radio 740 a.m. in Edmonton, on "The World at 5", August 22, 1996. Also see John Borrows, "The Trickster: Integral to a Distinctive Culture", Constitutional Forum Vol.8, No.2, 1997, at 29-30.

Constitution -- I am a member of the Dene Nation."[100] Erasmus went on to condemn the Irwin package as offering less than the generally unsatisfactory Community-Based Self-Government package flogged by the preceding Mulroney Tories and pretty much shelved by the Liberals under Chretien. In particular, Erasmus noted that the new policy proposal off-loads federal constitutional responsibilities to the provinces, thereby bringing provinces in as equal partners in trilateral discussions contrary to the nation to nation relationship claimed by Erasmus and other aboriginal nationalists.

The Irwin policy asserts the inherent nature of an aboriginal right to land, a right that is justiciable, negotiable, may require provincial involvement, must be realised within Canada, is subject to the Charter, and is not sovereign in the sense of nation-state sovereignty. Aboriginal governments may hold concurrent jurisdiction with the federal government further to section 91(24) of the Constitution Act 1867, subject to federal and provincial supremacy in areas of national interest.[101]

A contrasting view is offered by the Royal Commission on Aboriginal Peoples (RCAP). RCAP holds that the right of 'self-government' under s. 35 is inherent, is a constitutional right "exercisable only within the framework of Confederation", does not translate to state sovereignty; and thus places aboriginal governments in "the same position as the federal and provincial governments".[102] RCAP suggests that section 91(24) Constitution Act 1867 be read as a head of governance powers, with jurisdictional parameters similar to the federal government under that section.[103] These rights may be limited by other governments providing they meet the Sparrow test.

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[100] CBC Radio, "The House", August 12, 1995. The historic declaration, passed in 1975, recognises the Canadian state as a reality forced upon the Dene, but rejects the Government of Canada as the Government of the Dene. Within the realpolitik, the Dene Declaration calls for "independence and self-determination with the country of Canada". Reproduced in Michael Asch, Home and Native Land, Methuen, Agincourt, Ontario, 1984, at 127-128.

[101] Department of Indian and Northern Affairs policy paper, DIAND, Ottawa, 1995, at pages 1-12.

The contentious question of whether Canada's Charter of Rights and Freedoms applies to aboriginal governments is well explored by the RCAP. Because of RCAP's high profile, comprehensive mandate and extensive and credible research process, it is useful to review its findings. (However, the Chretien government has ignored the Report to date.[104]) On the relationship of the Charter to aboriginal governments, the RCAP struggles to support application of the Charter with potential for Charter exemption:

> First, the Aboriginal right of self-government as such is shielded from Charter review because it is protected by section 25 of the document, which states that the Charter shall not be interpreted so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms held by Aboriginal peoples. Second, individual members of Aboriginal groups enjoy the protection of Charter provisions in their relations with Aboriginal governments.[105]

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[102] Royal Commission on Aboriginal Peoples, Partners in Confederation, Minister of Supply and Services Canada, Ottawa, 1993, at 36.

[103] Ibid at 38.

[104] See, for example, Joyce Green, "Options for Achieving Aboriginal Self-Determination", Policy Options Vol.18, No.2, 1997.

[105] Ibid at 39.

RCAP argues that this distinguishes between the right and the exercise of the right; however it is more like a distinction between the collective right and the rights of the individuals of the collectivity[106] -- a mushy view at best.

RCAP takes the position that the Charter "applies to Aboriginal governments and regulates relations with individuals within their jurisdiction".[107]

> Under section 35 of the Constitution Act, 1982, an Aboriginal nation has the right to determine which individuals belong to the nation. However, this right is subject to two limitations. First, it cannot be exercised in a manner that is discriminatory toward women or men. Second, it cannot specify a minimum 'blood quantum' as a general prerequisite for citizenship. Modern Aboriginal nations, like other nations in the world today, represent a mixture of genetic heritages. Their identity lies in their collective life, their history, ancestry, culture, values, traditions and ties to the land, rather than in their race.[108]

The Charter applies to aboriginal governments in a general way, though all provisions may not apply, according to RCAP.[109] The RCAP suggests three basic principles frame Charter application: first, all people in Canada are entitled to Charter protection in relation to governments in Canada; second, aboriginal governments hold the same position in relation to the Charter as do federal and provincial governments, which means aboriginal governments have access to section 33 notwithstanding clause; and third, the Charter should be interpreted in relation to aboriginal governments in a manner that takes aboriginal philosophies, cultures, and traditions into account.[110]

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[106] Ibid.

[107] Royal Commission on Aboriginal Peoples, Restructuring the Relationship, Vol.2, Supply and Services Canada, 1996, at 168.

[108] Ibid.

[109] Ibid at 226.

The RCAP recommends treaties, covenants, and political accords as the mechanisms of choice for implementation of the right of governance, rather than legislation and constitutional amendments,[111] and urges that these be negotiated with federal and provincial governments, via the processes of co-operative federalism or implemented autonomously by aboriginal peoples.[112] Surprisingly, the RCAP appears to validate the current Irwin initiative, suggesting that federal framework legislation supplementing or replacing portions of the Indian Act would be helpful.[113]

It is as an incident of aboriginal and/or treaty rights, protected by section 35 of the Constitution Act 1982, that self-government is invoked as a right by aboriginal politicians, and it is as self-determining, self-governing entities that bands claim the right to determine band membership without regard to the Charter of Rights and Freedoms or to any external code of rights. The autonomous right to self-determine is appealing as an incident of governance. After all, there is no more authoritative body than a particular group as to who the people involved are. However, the initial appeal of this argument pales when it is held against the reality of the internalised practice of exclusion of women who 'marry out'. Self-determination is a right of whole peoples, not partial ones. Self-determination may not be

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[110] Ibid at 230.

[111] Ibid at 44-45.

[112] Ibid at 47.

[113] Ibid at 48.

practised in ways which unilaterally and arbitrarily disenfranchise segments of the self-determining population. And, the resistance to incorporating any external form of accountability is suspect. As Leslie Green remarks, "the right to non-interference in internal matters is the first refuge of a government intent on violating rights"[114]

In its final report, the RCAP moves the language of membership to citizenship, suggesting that aboriginal people may hold dual citizenship in their nation and in Canada.[115] The determination of an aboriginal nation's citizenship "would be based on criteria set by the nation's constitution, citizenship law or code, cultural norms, unwritten customs or conventions".[116] As possible criteria for citizenship RCAP lists community acceptance, self-identification, parentage or ancestry, birthplace, adoption, marriage to a citizen, cultural or linguistic affiliation, and residence.[117] RCAP speculates that the nation's constitutional or citizenship law would 'likely' identify the conditions for loss of citizenship, dual citizenship with other aboriginal nations, and the "implications for access to rights and benefits".[118] However, citizenship criteria "must not" discriminate on the basis of sex, nor should they be racialist by requiring either ancestry or blood quantum.[119]

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[114] Leslie Green, "Internal Minorities and Their Rights", Group Rights (Judith Baker, ed.), University of Toronto Press, 1994, at 101.

[115] Royal Commission on Aboriginal Peoples, Restructuring the Relationship, Vol.2, Supply and Services Canada, 1996, at 251.

[116] Ibid.

[117] Ibid.

[118] Ibid at 252.

[119] Ibid.

Particularly for feminist women, who are marginalised and therefore cannot reasonably expect to use the review mechanism of regular elections as a limitation on government abuses, this must seem cold comfort. The access to citizenship, as well as the ability to exercise it, will most likely be (if RCAP is persuasive) left to the will of aboriginal governments, which to date have shown little tolerance for dissenting women and little wish to reinstate those who have been removed by the pre-1985 Indian Act. Access to the Charter, which NWAC insisted must be available to aboriginal peoples in relation to aboriginal governments, will be conditional on favourable court decisions (on which feminists don't rely too comfortably) as well as on use of the notwithstanding clause by the very government which may be violating their rights. That is, if the Charter is loosely or conditionally applied to aboriginal governments, and if the latter may invoke the notwithstanding clause, then aboriginal governments might over-ride the Charter to achieve other broad political purposes, either in relation to Canada (witness the instrumental use of Indian women's rights in the 1960s and 1970s) or in domestic politics.

The claim to Charter exemption was made forcefully during the constitutional negotiations preliminary to the Charlottetown Accord, when the Assembly of First Nations' position was that the Charter not apply to aboriginal governments.[120] In this it was opposed by the Native Women's Association of Canada (NWAC), which was not permitted a seat at the negotiating table. NWAC's mandate is the promotion of aboriginal women's issues; the AFN purports to represent status Indian issues. Together with the Metis National Council, the Native Council of Canada, and the federal and provincial governments, the AFN saw no need for gender-specific advocacy. All of the latter were at the negotiating table, and, "ultimately the process excluded women qua women".[121] While not the only issue on NWAC's agenda, the status/membership issue and the opposition of many bands to the C-31 reinstatement provisions were central to its wish to be involved, and to advocate the application of the Charter to aboriginal governments. History had offered no reason for disenfranchised women to trust malestream aboriginal governments or lobby groups. And perhaps most importantly, the pandemic of violence against women and children in aboriginal communities[122] and the intimidatory tactics[123] used by those in power against women who analyse, organise, and advocate against the physical abuse, political minimisation, and legislative discrimination against women are ample evidence of the need for precisely the kind of intellectual and political work that foregrounds women.[124] As Marilyn Fontaine argued, addressing the Royal Commission on Aboriginal Peoples for the Aboriginal Women's Unity Coalition:

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[120] See Joyce Green, "Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government", Constitutional Forum Vol.4, No.4, Summer 1993, at 110. Hereafter "Constitutionalising the Patriarchy".

Ibid.

I want to make it clear here that there is also a pandemic of such violence in the dominant Canadian community, not that it is a particularly aboriginal phenomenon.

See notes 30 and 31 for examples of this.

A sampling of this kind of experience may be read about in Janet Silman, "We're Not Taking It Anymore", and generally, Enough is Enough: Aboriginal Women Speak Out, The Women's Press, Toronto, 1987; in Joyce Green, "Constitutionalising the Patriarchy", and in several submissions to the Royal Commission on Aboriginal Peoples, including the Women of the Metis Nation's "Women Who Own Themselves", August 30, 1993, and the Indigenous Women's Collective of Manitoba's submission of April 22, 1992.

> Aboriginal women have been reluctant in the past to challenge the positions taken by the leadership in the perceived need to present a unified front to the outside society which oppresses us equally. ... However it must be understood that Aboriginal women suffer the additional oppression of sexism within our own community. Not only are we victims of violence at the hands of Aboriginal men, our voices as women are for the most part not valued in the male-dominated political structures.[125]

Conclusion

The plaintiffs in Sawridge challenged "the constitutional authority of Parliament to enact sections 8 to 14.3, inclusive" of the C-31 amendments, as an extinguishment of their section 35 Constitution Act 1982 "existing aboriginal and treaty rights", in particular, their right to determine their bands' members.[126] The main provisions of these amendments that resulted in the court action by Twinn et al. were section 6(1)(c), dealing with the reinstatement of those who had lost status; and sections 6(1)(d),(e),(f) and 6(2), granting status to the children of such persons. Alternatively, the plaintiffs argued that the C-31 amendments violated their section 2(d) Charter rights of freedom of association, though this argument was not pursued with much vigour in the trial.

Interestingly, the plaintiffs did not challenge the right of Parliament to legislate with regard to membership under the old section 12(1)(b) and related provisions of the Indian Act. At first blush, it seems that it was the inclusion of formerly excluded women and their children that attracted the plaintiffs' attention. Even the Crown, never remarkable for its progressive stance on gender relations,[127] observed that the excluded women are "targeted by the plaintiffs".[128] Certainly, the exclusion of these persons had not been cause for their constitutional alarm. When Jeanette Lavell and Yvonne Bedard took their cases to the Supreme Court of Canada, arguing that section 12(1)(b) of the old Indian Act was discriminatory and contrary to the Canadian Bill of Rights (1960), the intervenors in the case were primarily status Indian provincial and national organisations, arguing for the Indian Act and against gender equality for Indian women.[129]

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[125] Rudy Platiel, "Aboriginal women challenge leadership", Globe and Mail, April 24, 1992.

[126] Defendant's Memorandum of Fact and Law, Court No. T-66-86, John C. Tait, Q.C., Deputy Attorney General of Canada, Per: Dogan D. Akman, Civil Litigation Section, Room 532, Department of Justice, Ottawa, Ontario, K1A 0H8, Solicitor for the Defendant, at page 22. Hereafter "Defendant's Memorandum".

The plaintiffs in Sawridge argued that the aboriginal right to determine band membership had been incorporated in their treaties by implication, and that the various Indian Acts had conformed with the aboriginal and treaty right to define band membership. Indeed, the plaintiffs suggested that the Indian Acts were intentionally crafted so as to conform to aboriginal cultural practices. However, the Court noted that the Indian Act existed and was already in force when the plaintiffs' treaties were negotiated[130] and that increasingly stringent patriarchal status criteria were developed over several amendments of the Acts. The approximation of a section of any Indian Act to aboriginal practice was coincidental, not intentional. An examination of the Indian Act continuum shows the increasingly stringent, patriarchal and discriminatory status criteria enforced by the federal government.

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[127] See, for example, Attorney General of Canada v. Lavell and Isaac v. Bedard, and Native Women's Association of Canada v. Canada, in all of which the Crown argued against women's inclusion, in the first two instances, as against the exclusionary provisions of the old Indian Act, and in the last, in relation to the inclusion of the national native women's association in constitutional talks.

[128] Defendant's Memorandum of Fact and Law, Court No. T-66-86, John C. Tait, Q.C., Deputy Attorney General of Canada, Per: Dogan D. Akman, at 25. Hereafter "Defendant's Memorandum".

[129] For a discussion of this, see Kathleen Jamieson, Indian Women and the Law in Canada: Citizens Minus, Supply and Services, Ottawa, 1978; Janet Silman, Enough is Enough: Aboriginal Women Speak Out, The Women's Press, Toronto, 1987; and Harold Cardinal, The Rebirth of Canada's Indians, Hurtig, Edmonton, 1977.

[130] Sawridge at paragraph 64.

The legislative oppression of Indian women is grounded in European patriarchal assumptions. Its imposition on the diverse indigenous nations of Canada is a consequence of the colonial homogenisation of indigenous nations into 'Indians', and its policy for its creation, Indians. The contemporary oppression of Indian women by Indian men can be traced to the damage colonisation does to societies, but it cannot be exonerated because of this. Nor is the violence inflicted on Indian women only physical and legislative: the racism endemic to Canadian society and its social, political, cultural, economic and legal institutions is experienced as violence by indigenous peoples. But it is not acceptable to strategise with women's rights as a bargaining chip, and the evils of colonial occupation cannot be exorcised on the backs of exited women. This argument is taken up further in Chapter Five.

The fears that have been expressed over the past several decades by Indian organisations and individuals about the danger of white male domination of reserves need to be examined for their assumptions and veracity. The Indian Act had been applying generic Euro-Canadian patriarchal (and racist) criteria. Through its operation, white and other non-aboriginal women marrying a status Indian male acquired the status of their husbands, becoming in law Indian themselves and acquiring the incidents of status, such as reserve residency rights and access to Indian rights and programs. They could, as could any other Indian, become politically active, though very few did. They could vote in band elections. They could become chiefs, and some did. That is, non-Indian women who were legally transformed into Indians were no different in law than other Indians, and yet this produced no fear of alien takeover from the Indian Association of Alberta and others. It was the prospect of white men similarly acquiring status from their Indian wives, together with the incidents of status, that raised the alarm. And yet the objective of the anti-12(1)(b) activists was to remove the discriminatory provisions from Indian women so as to permit them to remain in law and in practical application who they were, not to transmute their husbands into legal 'Indians'.

The objective of the Indian Act -- assimilation through the homogenisation of the diverse aboriginal nations into 'Indians'; application of uniform colonial standards; elimination of culturally idiosyncratic practices and their political manifestations -- is not attacked with the virulence that Indian women seeking to retain their status have been subjected to. Even in the construction of the problem and in the analysis of the situation the patriarchal perspective is dominant. The options that could have been pursued, but were not, include the uncoupling of status from residency rights; the uncoupling of residency from political rights; and the maintenance of political rights for status Indians, defined in some form of coherent cultural and social fashion. There was in the 1970s no status Indian declaration of a right to determine membership as an incident of aboriginal and treaty rights because of the need for cultural integrity or to preserve a unique Indian expression of citizenship.[131] Those arguments were developed later, when patriarchal exclusion was given the cachet of legitimacy through the language of constitutionally recognized rights. There was, however, no thought given to extending Indian women's citizenship capacity, but rather, much devoted to constructing 'Indian' as male plus derivative attached women and children, and limiting 'Indian' to mean what Indian men's citizenship capacity was and is. In this way, patriarchy and its logical practice through discrimination against women is defended as a cultural and legal barricade against the Other, this time, the White Man. In fact, the patriarchy is the barricade against the Other, woman. The protection against white domination could have been found in analysis of and attack on the Indian Act -- but Cardinal and others saw the Act as a necessary evil in a colonial political world where their experience was of race, not sex, discrimination, and Twinn et al. represent it as the embodiment of aboriginal tradition.

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[131] For the purpose of this chapter, citizenship is defined as the ability of members of a society to freely engage in social and political activity within the context of their society. It is not limited to membership in states. Insofar as citizenship is membership in a

The right of aboriginal nations to define membership (citizenship, in the formulation of some) cannot be ethically grounded in practices which deny citizenship to some on grounds that are viewed as illegitimate by the contemporary global community. Tradition is always with us, and has its virtues, but it is not immutable and it is not beyond critique. The suggestion that ascribing women's status perpetually to that of their husbands is necessary for cultural integrity and as a manifestation of the rights of indigenous nations in relation to the colonial state deserves no serious consideration.

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collectivity, and rhetoric of band control of membership has occasionally used the term 'citizenship' to explain the nature of the right to control membership, it is necessary to understand who may be a member and how members attain and retain their standing and what rights and duties accompany it.

Chapter Three
Arguing the Issues

Introduction

In the case of Sawridge Band v. Canada [1995],[1] the plaintiffs, Walter Twinn on his own behalf and on behalf of the Sawridge Band, Wayne Roan on his own behalf and on behalf of the Ermineskin Band, and Bruce Starlight on his own behalf and on behalf of the Sarcee Band, filed a suit for a declaration that sections of the C-31 amendments to the Indian Act of 1985 are inconsistent with parts of s.35 of the Constitution Act 1982.[2] C-31 was challenged as unconstitutional, and ultra vires of Parliament, because of the operation of section 35 of the Constitution Act 1982.[3] The plaintiffs argued that C-31 imposes a membership regime upon bands contrary to existing aboriginal and treaty rights and to customary law, and in particular, to the implied treaty right of bands to determine their own membership. The plaintiffs also alleged that the C-31 provisions offend their Charter section 2(d) associational rights[4] under the 1982 Charter of Rights and Freedoms, by forcing plaintiff bands' members to associate with those who reacquired status and band membership.

> We're talking about a contest between what we say is an aboriginal right and a treaty right possessed by Indian bands as part of their collective rights which is being interfered with on the basis of the application of a normative value of society.[5]

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[1] Sawridge Band v. Canada [1995], F.C.J. No. 1013; Action No. T-66-86, Muldoon J. Federal Court of Canada -- Trial Division. Hereafter Sawridge.

[2] Constitution Act 1982, Chap.11 (U.K.)

[3] Section 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[4] 2. Everyone has the following fundamental freedoms: (d)freedom of association.

[5] Court transcript, recorded by David Mackay, C.S.R., R.P.R. Mr. Henderson's submission, April 22, 1994, Volume 78. Hereafter "Court Transcript, Vol.78."

The plaintiffs argued that their cultural tradition of patrilineal band membership anchored their aboriginal and treaty right to determine band membership in ways that would exclude Indians who reacquired status under the C-31 amendments. Further, the Charter of Rights and Freedoms, argued the plaintiffs, could not be applied to limit exercise of section 35(1) rights.

The plaintiffs alleged that C-31

> imposes members on a band without the necessity of consent by the council of the band or the members of the band itself and, indeed, imposes such persons on the band even if the council of the band or the membership objects to the inclusion of such persons in the band.[6]

They argued that the plaintiffs' historical existence in organised societies, and the absence of any statute or treaty extinguishing the right of organised societies to determine their own membership, is the complete foundation of the alleged right.

The plaintiffs asserted two aboriginal rights. The first is the right to exclude women who married non-Indians, based on aboriginal custom that "upon marriage the woman followed the man to reside in or at his ordinary residence within his tribal group, not hers."[7] That is, the plaintiffs argued that the alleged tradition of patrilocality/patrilineality is a sufficient base of aboriginal tradition. The second right claimed is "that control of membership is an inevitable incident of their ancestors' 'organised societies'"[8] and so is a surviving aboriginal right protected by treaty. In the words of one witness, "the question of who should live on our reserve is really a matter that should be decided by us as people who own and live on the land."[9] The plaintiffs also maintained that the exclusion of C-31 returnees is because of their unfamiliarity with their bands' culture and the costs of providing for 'new' members, including per capita payments, housing and land. So, the practice of patrilineal and patriarchal exclusion is not only a tradition, but a means of controlling costs of services to members.

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[6] Sawridge verbatim decision, at paragraph 14.

[7] Ibid at paragraph 49.

[8] Ibid.

The issues in Sawridge are substantial, and potentially affect all indigenous nations in Canada. They bear on the relationship between aboriginal nations and the state, as well as on the relationship between aboriginal persons and aboriginal governments, and between aboriginal persons and state governments. They bear on questions of rights: human rights, aboriginal and treaty rights, and equality rights. They suggest conceptions and applications of justice. The issues raise fundamental questions about indigenous-settler state relations as historically constructed, as containing relations of subordination, and as part of the struggle for decolonisation and justice. They challenge notions of tradition, of culture, and of universal normative standards. At the same time, the issues suggest consideration of who frames the questions, who defines justice, and who is voiceless in this process. At the heart of this case is the plight of a small, politically irrelevant, relatively powerless group of people: those who claim indigenous identity and band membership, and who have historically been denied it by the state, and continue to be denied it by bands acting to exercise the contested right to define membership, in a manner which prima facie violates Charter equality rights.

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[9] Mrs. Sophie Makinaw, oral answer translated by Harold Cardinal. Court transcript, Vol.78.

The Sawridge Band is part of Treaty 8, the Ermineskin Band is part of Treaty 6, and the Sarcee Band,[10] self-identified as Tsuu Tina, is a member of Treaty 7. The three treaties cover all of Alberta, parts of Saskatchewan, and the northeast corner of B.C.

At a minimum, the case has implications for this treaty area, for, had the court found a treaty right to control band membership without regard to the constitutional norms of the state, all bands party to the three treaties would have been affected. Had the court found an aboriginal right to control membership or citizenship, either confirmed or compromised by treaty, then all bands in Canada, and all existing or potential C-31 applicants, would have been affected.

The Native Council of Canada, the Native Council of Canada (Alberta), and the Non-Status Indian Association of Alberta sought and won leave to intervene. This chapter examines the core of the plaintiffs' arguments, the Crown's defence, the intervenors' issues, and the court's decision.

The Plaintiffs' Argument

The plaintiffs allege that the Section 35 "existing aboriginal and treaty rights" include the right of bands to determine their membership, and that the impugned amendments to the Indian Act offend these rights and so are of "no force and effect to the extent of the inconsistency pursuant to section 52 of the Constitution Act, 1982".[11] This particular right was claimed as an incident of customary law.[12] They argued that their bands had a pre-existing aboriginal right to control membership, recognised by the Royal Proclamation of 1763, and that the Indian Acts confirmed the right of Indian bands to control their own membership. No treaty or statute had restricted this right, which preceded the existence of the state. The treaties established designated lands for the sole benefit of the particular treaty bands, and permitted the bands, "under their respective customary laws, to determine membership in the bands".[13]

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[10] Tsuu Tina used the form 'Sarcee' in the court documents, and therefore it is referred to here as 'Sarcee'.

[11] Defendant's Memorandum of Fact and Law, (at page 2) Court No. T-66-86, John C. Tait, Q.C., Deputy Attorney General of Canada, Per: Dogan D. Akman, Civil Litigation Section, Room 532, Department of Justice, Ottawa, Ontario, K1A 0H8. Hereafter "Defendant's Memorandum".

The plaintiffs argued that the Crown has a fiduciary obligation to bands that extends to protecting aboriginal rights from legislative extinguishment or interference except further to the rigorous Sparrow[14] test. In Sparrow, the Supreme Court of Canada decided that aboriginal rights anchored by demonstrated practices could only be limited explicitly for valid legislative objectives. Any such limitation should be made in ways that mitigated the state interference with the rights in question as determined by state consultation with the aboriginal peoples to be affected. The plaintiffs relied on Sparrow to show that where there is a right, the Crown must move cautiously in interfering with it. The imposed cost of 'new' members pursuant to the 1985 Indian Act, the plaintiffs argued, is prima facie interference.

The plaintiffs argued that the Crown owes its fiduciary obligation to collectivities, to bands, not to individuals. Reserve lands are held collectively. Bands are collective bodies. The Indian Act, despite its assimilationist character and intent, has nevertheless contemplated these collectivities. It is the band that has an interest in land. This right is collective, and sui generis; following Calder,[15] it is more than the right to enjoyment and occupancy but "at the very least there is no dispute that it includes the concepts of enjoyment and occupancy". The right to decide who occupies, enjoys and uses reserve land is the band's. The government has an obligation to protect the band's interests.[16] The constitutional prohibitions against gender discrimination cannot be held to apply to aboriginal rights based on traditional or customary practices, because to do so would be to impose contemporary western normative values retroactively.[17]

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[12] Ibid at 4.

[13] Paragraphs 9 through 11 of the plaintiffs' amended statement of claim, cited in Sawridge at paragraph 41.

[14] *R. v. Sparrow,* [1990] 1 S.C.R. [hereinafter *Sparrow*].

Custom, or tradition, forms the evidence for the existence of the right. In support of this, the plaintiffs cited Delgamuukw, in which the appellate judges concluded unanimously

> that aboriginal rights arose from such of the customs, traditions and practices of the aboriginal people in question as formed an integral part of their distinctive culture at the time of the assertion of sovereignty by the incoming power ... and which were protected and nurtured by the organized society of that aboriginal people. Those aboriginal rights were then recognized and affirmed by the common law when the common law became applicable following the assertion of sovereignty with the result that those rights became protected as aboriginal rights under the common law. Existing aboriginal rights became constitutionally protected in 1982 as part of the constitutional amendments embodied in the Constitution Act, 1982, as section 35.[18]

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[15] Calder v. A.G.B.C., [1973] S.C.R., which established in Canadian law the proposition that occupancy from 'time immemorial' was the foundation of aboriginal land-based rights, and that the Crown could extinguish those rights. The case is viewed as foundational insofar as the coloniser's court confronted the aboriginal existence as a rights-laden reality with which the Crown must grapple.

[16] Ibid.

[17] Court transcript, recorded by Genevieve MacKenzie, C.S.R., Certified Shorthand Reporter, April 21, 1994, Volume 77. Hereafter "Court transcript, Vol.77."

[18] Delgamuukw v. British Columbia [1993], 5 W.W.R. 97. In Delgamuukw, the Gitksan and Wet'sowet'en nations claimed their traditional territories in north-western B.C., along

Again referring to Delgamuukw, the plaintiffs quoted: "No declaration by this court is required to permit internal self-regulation in accordance with aboriginal traditions, if the people affected are in agreement." The plaintiffs argued "that's exactly our case. We're talking about the reserve communities exercising that." Again quoting from Delgamuukw, "But if any conflict between the exercise of such aboriginal traditions and any law of the province or Canada should arise the question can be litigated." In this case, the plaintiffs argue that there is a conflict between an alleged aboriginal right and the law of Canada. The establishment of custom points to a right and the right must be respected by the Crown. The Crown may extinguish or otherwise interfere with it, subject to the tests described in Sparrow.

> (W)e are not claiming a right of legislative power, we are not claiming a right of judicial power, all we're claiming is a right to determine membership within the group as a collective matter such that admissions would have to be dealt with by the group. ... But given compliance with the general law of the land and the Constitution all we're saying, My Lord, is that we have the right to determine the membership on a collective basis.[19]

The passages below indicate that Justice Muldoon and the plaintiffs seemed to agree on the relationship of custom to aboriginal right.

> MR. HENDERSON: The only reason that content is important is to prove the existence of the right. The right is not to be frozen forever. If the aboriginal right existed and one mode of expression of it was woman follows the man, which we urge on you in this case, that proves that there was a practice that was integral and that there was an aboriginal right to determine membership. And that doesn't mean that every Indian community forever must have that rule.
>
> THE COURT: You say that the expression in one form or another, whatever content, proves the right to make an expression, to clothe the intent.

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with their right to govern the territory.

[19] Court transcript, Vol.77.

> MR. HENDERSON: But the custom, My Lord, as a matter of law is not the right. The custom is just a way to demonstrate that there was a right.
>
> THE COURT: Sure, I agree, without custom there is no right. It's the sine qua non of an aboriginal right.[20]

Custom, then, is determinative of an existing aboriginal or treaty right. This is taken up again in the conclusion of this chapter.

The plaintiffs argued that the membership limitations of the Indian Acts were in fact "a statutory recognition of a practice that the government recognized the Indians had been conducting since time immemorial. "(T)he evidence is clear that women followed the men in aboriginal times".[21]

The plaintiffs urged the court to find an aboriginal right to determine band membership surviving the 1985 Indian Act amendments.

> MR. HENDERSON: My Lord, if you find any custom as a fact in this case in aboriginal times with respect to deciding what you are persuaded has to do with what membership meant in aboriginal groups in aboriginal times, then that means that there was an aboriginal right, as the plaintiffs state, to determine membership. ... there are no individual rights to claim membership in the aboriginal sense. There is only a collective social right.[22]

This collective aboriginal right, the plaintiffs claimed, was affirmed by the treaties of the appellant bands: "it is at least clear that the Indian band community as a result of the treaty was to get a collective interest in the reserve without any individual interests in the reserve in competition with that."

The plaintiffs argued: "Typically, the signing of a treaty by an Indian band also involved the voluntary diminution by the band of specified aboriginal rights." They further argued that the right of band members to determine band membership was "an existing aboriginal right prior to the signing of Treaty Nos. 6, 7 and 8" and existed as such at the time of proclamation of the 1982 Constitution. Therefore, their customary laws regarding band membership continue.[23] This "was impliedly recognized by the treaty process and thus became a treaty right as well as an aboriginal right".[24] Any treaty diminution of aboriginal rights must be specified in the treaty and does not impair "all aboriginal rights at large".[25]

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[20] Ibid.

[21] Ibid.

[22] Court transcript, Vol.77.

The plaintiffs then argued that if the government intended to extinguish the aboriginal right to determine membership, it was required, pursuant to Sparrow, to do so in a clear and plain manner. This, they argued, was not evident in any legislation.

> If there is any mode of expression of the right left by the statute I say that it can't have met the clear and plain test because there can't be any expression left in my submission, My Lord, if the government is to discharge the onus of saying that it's clearly and plainly intended to be done away with for all purposes. There can't be a crack left. And that's the essence of my argument on extinguishment, My Lord."[26]

The plaintiffs argued that if the Crown intended to interfere with the aboriginal right, then it was required to consult with the affected community to determine its "preferred means" of the interference.

> There is an expression used in Sparrow called preferred means. And you have to ask the aboriginal communities what is your preferred means. If we're going to interfere what is your preferred means of the interference.

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[23] Sawridge, at paragraph 40.

[24] Ibid at paragraph 44.

[25] Ibid at paragraph 45.

[26] Court transcript, Vol.77.

> And I say that obligation, the government has to ask that of the aboriginal community who possesses the collective right."[27]

The plaintiffs then argued against the retroactive effect of applying the Charter protection against gender discrimination to traditional practices and to band membership codes developed before the relevant sections kicked in.

> (T)he law is clear that section 15 cannot be used as a legal justification, as I said, to redress past wrongs ... section 15 as a matter of law can't ever have retrospective application". ... The second proposition is that section 25, independently of the retrospectivity issue, ... says that section 15 cannot be used to derogate from the aboriginal and treaty rights protected by section 35(1)."[28]

That is, the plaintiffs argued that the Charter cannot limit section 35 aboriginal and treaty rights.

The plaintiffs went on to argue that the valid legislative objective of righting past wrongs would fail because one cannot apply current normative standards retroactively so as to impose contemporary consequences.

> (This) really is a central theme in my case ... (to) suggest that while there is an additional legislative, valid legislative purpose here, and that is to redress past wrongs. ... first of all there has to be some standard by which we judge that the events that we say were wrongs that need to be remedied were wrongs, and that standard cannot be section 15. In my submission, My Lord, nor can it be section 35(4), because section 35(4) again cannot have retrospective application because section 35 has been interpreted as not having retrospective application."[29]

The plaintiffs argued that Section 15 of the Charter cannot be used to reach into the past, to remove the then-lawful consequences from validly enacted legislation that, subsequent to the Charter, is characterised as discriminatory. They claimed that retroactive discrimination is irrelevant to the courts. As a matter of law, 12(1)(b) was not discrimination under the Canadian Bill of Rights; the Supreme Court decided that in Lavell[30]. Section 12(1)(b) was a lawful provision, and the Charter equality rights were not law till 1982 and in fact, were not in force till 1985. Those suffering from the consequences of 12(1)(b), then, are not entitled to invoke section 15 of the Charter, because to do so would be to make the Charter retroactive. Indeed, the plaintiffs argued that C-31 is itself retrospective.[31]

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[27] Ibid.

[28] Ibid.

[29] Ibid.

The plaintiffs argued that a retrospective statute contemplates future events only. "It is prospective, but it imposes new results in respect of a past event."[32] Counsel argued that a retrospective statute attaches new contemporary consequences to an action occurring prior to the statute's enactment.

The plaintiffs argued that if the contested consequences occurred before Section 15 came into force, then Section 15 should not be used to change that result. "(Y)ou can't use Section 15 as a valid legislative objective in order to comply, to state, "We have to comply with the law," to reach back retrospectively, as it says here, and change the law from what it otherwise would be with respect to a prior event."[33] For section 15 to apply, they argued, there must be an actual or continuing discrimination which deprives one of the equal protection and benefit of the law.

The plaintiffs sought to show that the Charter could not in fact be invoked in relation to section 35(1) powers, because section 35 is not a Charter right, and section 25 of the Charter protects section 35 rights from the Charter. The argument contended that section 28 of the Charter requires rights in the Charter to be applied equally. But section 35(1) is not a Charter right. Section 28, then, is irrelevant. However, section 25 of the Charter also refers to non-Charter rights; "it tracks specifically the Section 35(1) rights and says specifically that they are shielded from the equality provisions of the Charter and, in fact, from any of the Charter provisions."[34] Section 25, according to the plaintiffs, insulates section 35 from derogation by the Charter. The plaintiffs continued by arguing that standard legal interpretive principles required the courts to give greater effect to specific legislative intention than to general legislative statements.[35] Therefore, "section 25 is entirely specific to protecting the integrity of 35(1) from the Charter and from challenges based on the Charter. Therefore, ... Section 25 would always have to avail over Section 28 in any event even if Section 28 was not limited on its own terms to Charter rights."[36]

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[30] A.G. of Canada v. Lavell c. Bedard, S.C.C. [1974], S.C.R. 1349. In this case, Lavell and Bedard challenged section 12(1)(b) of the Indian Act R.S.C. 1960 as offensive to the Canadian Bill of Rights, S.C. 1960. The court held that equality under the law meant equal application of the law. Since all Indian women marrying non-status persons were dealt with via 12(1)(b), the section was not in law discriminatory, although it was clearly discriminatory in fact. This case nicely illustrates the difference between law and real life.

[31] Court transcript, Vol.78.

[32] Ibid.

[33] Ibid.

The paramountcy of section 35(1) was argued to be essential to what the plaintiffs called 'special status'. This designation is not the same as 'difference'; it is not diversity that is protected, but a separate status located in history and politics. This status must be defended against the encroachment of the dominant liberal ideology. "If you permit the values of society at large to be used as a justification to intrude upon the results of special status, then that really means there is no special status at all."[37] The plaintiffs went on to argue that "what Section 35(1) says and has been interpreted to mean is that ... existing aboriginal and treaty rights are recognized and affirmed". Then, subsequent to the Sparrow decision, these rights are also constitutionally entrenched and the government can no longer extinguish them. Any interference with section 35(1) rights is subject to the justification test in Sparrow. This would mean that section 91(24)[38] of the Constitution Act 1867 had to be read in conjunction with section 35.[39]

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[34] Ibid.

[35] Ibid.

[36] Ibid.

[37] Ibid.

[38] "Indians, and Lands reserved for the Indians."

[39] Court transcript, Vol.78.

> (A)s a matter of law, statutes can be passed and regulations can be promulgated that have the effect of interfering but not extinguishing, but they might not even interfere. They may not even interfere unless the interference is justified according to the very rigorous tests set out in Sparrow.
>
> Just to bring this full circle, that's exactly what we're talking about in this case. We're talking about a contest between what we say is an aboriginal right and a treaty right possessed by Indian bands as part of their collective rights which is being interfered with on the basis of the application of a normative value of society.[40]

The plaintiffs, apparently taking the Sparrow exhortation for consultation as a requirement rather than a factor[41], argued that the court must apply the Sparrow formula for compensation for the interference with an aboriginal right: "if you're going to interfere with people's rights and cost them, you also at the very least have to reimburse them".[42]

Testimony introduced by the plaintiffs suggested fears of the consequences of returning women and their families. "Those women now have their children, and in some cases they have their grandchildren. And in many cases if they return to our reserves, they will want to come back with their husbands".[43] The witness went on to talk about fears of the 'white man', and about problems with limited reserve land, with housing, and with provision of services. But most significantly, the witness emphasized that the effect of C-31 would be to compel reserves to accept white men.[44]

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[40] Ibid.

[41] The Sparrow test requires that the Crown prove a valid and compelling legislative objective for limiting the aboriginal right, , and also, that "the measures taken to meet that objective are consistent with its fiduciary duty towards the Aboriginal peoples". Kent McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?", Constitutional Forum Vol.8,
No.2, 1997, at 33-35.

[42] Mr. Henderson for the plaintiffs, Court Transcript recorded by David Mackay, C.S.R., R.P.R., Court File No. T-66-86, April 25, 1994, Vol.79.

[43] Testimony by Mrs. Makinaw, cited in Sawridge at paragraph 16.

[44] Sally Weaver writes that the 1869 Indian Act criteria on intermarriage were designed with precisely this in mind, to prevent "men not of Indian Blood having by marrying Indian women wither through their Wives or Children any pretext for Settling on Indian lands".

The Defendant's Argument

The Crown took the view that the plaintiffs' submission raised questions of fact and law, which required a substantial ethno-historical evidentiary foundation in addition to a legal foundation.[45] The notion of 'aboriginal times' was fraught, as it suggests pre-colonial contact, and evidence cannot be inferred about these practices as witnesses are anchoring their statements to post-colonial and indeed, contemporary understandings.[46] The plaintiffs' failure to produce evidence on cultural practices indicating a right of membership control compatible with the 12(1)(b) rule meant that their case was "'not proven' as a matter of fact and 'not provable' as a matter of law".[47] The Crown argued that the plaintiffs' allegations of fact are disputable and in error.[48] As well, the Crown said that the allegations of law are wrong, and that "if the aboriginal right (of band control of membership) ever existed it was: (i) extinguished by the said treaties and by successive Indian Acts commencing in 1876; and (ii) replaced by a statutory scheme ...".[49]

Further, in reply to the plaintiffs' assertion that their tribes and bands were political units preceding the state, the Crown contended that "tribes and bands" are Euro-Canadian

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Superintendent General of Indian Affairs, cited in Weaver, "First Nations Women and Government Policy, 1970-92: Discrimination and Conflict", Changing Patterns: Women in Canada (2nd) (Sandra Burt, Lorraine Code, and Lindsay Dorney, eds.), McClelland & Stewart Inc., Toronto, 1993, at 95.

[45] Defendant's Memorandum of Fact and Law, Court No. T-66-86, John C. Tait, Q.C., Deputy Attorney General of Canada, Per: Dogan D. Akman, Civil Litigation Section, Room 532, Department of Justice, Ottawa, Ontario, K1A 0H8. Hereafter "Defendant's Memorandum".

[46] Defendant's Memorandum, at 8-9.

[47] Defendant's Memorandum, at 6.

[48] See, for example, the Crown's characterisation of the plaintiffs' evidence as inconsistent and contradictory because of lack of knowledge, manipulation, ideological rigidity, and "ethno-genetic creativity". Defendant's Memorandum, at 110.

[49] Sawridge unedited verbatim transcript of the decision, at paragraph 42.

terms, politically and historically laden.[50] The Crown took the position that, "if the aboriginal right alleged by the plaintiffs ever existed", it was extinguished by the treaties and by the Indian Acts from 1876 onward, and was "replaced by a statutory scheme"; that is, by the Indian Act membership provisions.[51] That is, extinguishment of the aboriginal right was central to the Crown's argument, a grim reminder of the Canadian state's commitment to extinguishment of aboriginal rights in the process of recognising them.

But, the Crown argued, at the core of the plaintiffs' arguments was the challenge to the constitutional authority of Parliament, by way of section 91(24) of the Constitution Act 1867, as a result of section 35 of the Constitution Act 1982.[52] This position was taken despite the specific acknowledgement by the plaintiffs that Parliament did have such constitutional authority up to the time of the C-31 amendments.[53] Therefore, the Crown argued, the C-31 reinstatements were being restored status by the same exercise of constitutional authority by Parliament as had originally cost them their status.[54]

The Crown suggested that the plaintiffs would have to prove that their aboriginal right was "cognizable at common law", and would have to produce evidence that showed the alleged customary practices existed. Only if both those matters were proven could the treaty right alleged by the plaintiffs be shown to exist as a matter of law, either at common law or as part of the section 35 package. However, even if these conditions were met, the Crown suggested that any prima facie infringement would have to be examined in light of the Sparrow test. The Sparrow test examines reasonableness of the limitation: whether the measure of hardship imposed is undue; and whether the amendments denied the plaintiffs their preferred means of exercising their right.[55] The Crown argued that the limitation was reasonable as a matter of law, in that it brought Canadian law into conformity with the Charter and with the International Covenant on Civil and Political Rights; and as a matter of fact, as it was not inconsistent with proven aboriginal practices.[56] Nor was any undue or other hardship imposed, as none was demonstrated in evidentiary terms, and because the impact of reinstatement on the plaintiff bands "has been nominal, at best and negligible, at worst".[57] Finally, the plaintiffs were not denied a preferred means of exercising their right, as evidence shows no historic "necessity of satisfying a condition precedent such as obtaining bands' consent".[58] But even if the court found an infringement, the Crown argued, it was justified under the Sparrow test in that the impugned legislation had a valid legislative objective, did not diminish the honour of the Crown or vitiate the fiduciary relationship between the Crown and aboriginal communities, was a minimal infringement, following a process of discussion, negotiation and compromise, and includes remedial programs and policies to minimise the impact.[59]

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[50] Ibid at paragraph 14.

[51] Defendant's amended statement of defence, cited in Sawridge at paragraph 42.

[52] Defendant's Memorandum, at 26.

[53] Defendant's Memorandum, at 30.

[54] Ibid at 31.

[55] Defendant's Memorandum at 112-117.

Precedent only showed recognition of rights flowing from statute or from common law, not from 'customary law'.[60] While aboriginal custom can have the effect of showing an aboriginal right, the Crown cited Van Der Peet[61] to argue that not all traditional aboriginal practices give rise to a right; only those which are "integral to the distinctive culture" of the relevant society would do so. Indeed, aboriginal practices which had developed in response to European influences would not manifest such a right.[62] To succeed, the plaintiffs would have to prove an inherent aboriginal collective right to determine band membership, pursuant to "pre-historic and/or the proto-historic" custom.[63] The Crown argued the plaintiffs' evidence on the existence of such a pre-colonial tradition was uncompelling.[64] Therefore, if the practice of excluding women who married 'out' arose after imposition and as a result of the Indian Acts, it could not be an aboriginal right at all. (Van Der Peet was appealed to the Supreme Court of Canada, and in August 1996, the SCC held that an aboriginal right is composed of "a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right".[65]) But, the Crown argued, the plaintiffs had not provided the necessary proof to establish their claims, and so the rest of their claim remained unproven. However, if there was any infringement, it was justified by the Sparrow test.[66]

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[56] Ibid at 112.

[57] Ibid at 113-117.

[58] Ibid at 117.

[59] Ibid at 118-119.

[60] Ibid, at 32.

[61] Dorothy Marie Van Der Peet v. The Queen, Federal Court of Appeal.

[62] Ibid, cited in Defendant's Memorandum at 35. But see John Borrows' critique of this line of reasoning. "The Trickster: Integral to a Distinctive Culture", Constitutional Forum, Vol.8, No.2, Winter 1997, at 28-29. Hereinafter "The Trickster".

Nor was the Crown prepared to concede the Charter section 2(d) argument. The freedom of association guarantee

> does not protect particular activities or goals but the right of individuals to pursue common goals in association with others or to exercise in concert the individual rights and freedoms guaranteed by the Constitution.[67]

While individual band members would have a right of freedom of association, bands do not.[68]

The Crown summarised the evidence on pre-colonial tradition: (1) wives did not always 'follow' their husbands; sometimes husbands 'followed' their wives; (2) cohabitation with residence and participation in the husband's band was not synonymous with band membership; and (3) marrying a non-band member did not cost a woman membership in her own band.[69] The Crown urged the Court to "direct the Chiefs and band councils of the plaintiffs' bands and the plaintiffs to comply forthwith" with the amended Indian Act, especially in relation to reinstated persons' rights.[70]

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[63] Defendant's Memorandum at 41.

[64] Ibid at 36, 42, and 44.

[65] R. v. Van der Peet, S.C.C. No. 23803, [1996] S.C.J. No.77. Also "How to identify an aboriginal right", Verbatim excerpts from the Van Der Peet decision, The Globe and Mail, August 23, 1996, A17.

[66] Ibid, at 28.

[67] Ibid at 128.

[68] Ibid at 129.

Intervenors' Arguments

The Native Council of Canada (Alberta)

The Native Council of Canada (Alberta) took the view that the treaties in question were designed to negotiate a land settlement and a regime of good relations between indigenous signators and the Crown's immigrants.[71] The NCC(A) argued that extinguishment of other aboriginal rights would have to be explicit, and control of membership is not so addressed. The issue of control of membership is a social right, not an incident of the land, and so must be dealt with separately from land. The treaty negotiations included commitments that Indian signators would not give up their lifestyle, which impliedly means their social practices. "This indicates that they had to be given permission to maintain hunting and fishing rights, but there was no need for permission to maintain their social customs because those had nothing to do with the land they were giving up."[72] However, the NCC(A) took the view that the C-31 amendments are consistent with aboriginal tradition and do not violate the Plaintiffs' aboriginal and treaty rights.[73]

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[69] Ibid, at 57.

[70] Ibid at 131.

[71] Court transcript, Vol.71, April 13, 1994. David Mackay, C.S.R., R.P.R.T. James O'Reilly for the Native Council of Canada (Alberta). Hereafter "Court transcript, Vol.71".

[72] Ibid.

Section 35(4) of the Constitution Act 1982 subjected all section 35 aboriginal and treaty rights to the principle of equality. The NCC(A) cited Delgamuukw as "authority for the proposition that aboriginal rights in regard to social customs are not necessarily connected to land". It cited Sparrow for the proposition that aboriginal rights must be interpreted in a manner which permits their contemporary evolutions.

In Delgamuukw, the Gitksan and Wet'suwet'en nations claimed a contemporary aboriginal right to govern their traditional territories in north-western B.C. It was, in the NCC(A)'s words, a claim to "the whole bundle, as it were, that they had a right to occupy the land, govern the land, and do as they saw fit on the land, and that everyone on the land was subject to their dominion".[74] The court decided against the plaintiffs' historic land claim, but recognized that aboriginal rights "relating to the social organisation of the bands continued to exist".[75]

The NCC(A) quoted from Sparrow: "Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time."[76] In Sparrow, the court adopted Brian Slattery's view that the word "existing" in Section 35(1) means "affirmed and in a contemporary form rather than in their primeval simplicity and vigour".[77] The NCC(A), then, argued that regulation is not extinguishment, extinguishment must be clear and plain, and existing aboriginal rights exist in a contemporary form, rather than being ossified in an archaic form.

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[73] Memorandum of Fact and Law of the Native Council of Canada (Alberta), February 28, 1994, at 2-4. Hereafter "NCC Memorandum".

[74] Ibid.

[75] Ibid.

[76] Ibid.

The date on which the Crown's sovereignty in Alberta was effective is disputed. Is it 1670, the date of the Hudson's Bay Charter; 1763, the date of the Royal Proclamation; or 1870, the date which the relevant lands became part of Canada "and which, if it had been in doubt before, there was no question then that those lands were under the governance of the Government of Canada and that the common law would apply"?[78] The date is an historic milestone, for it is the temporal point at which an aboriginal practice must be proven, that practice must be "relatively free of European influence", and it is the point at which the common law is asserted.[79] It functions as a 'cut-off' point, after which aboriginal practice will not germinate.

The NCC(A), then, argued that the common law reads aboriginal rights to be essential cultural practices as of the date of importation of common law and of the date of sovereignty, even though that date is contested and varies across the country. Impliedly, aboriginal practices that arise as a consequence of aboriginal-colonial exchange cannot be deemed to be aboriginal rights, even though custom is a changing thing. This would include the adoption of western practices of patriarchy and patrilineality, and of Indian Act administration.

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[77] Ibid.

[78] Ibid.

[79] Ibid.

The current doctrine states that the currently recognized aboriginal right must have its origin in the historical practise of the current claimant's ancestors, and that the historical practise must be as it was as of the assertion of common law, and it also must be a practice that was relatively free of European influence.[80]

The NCC(A) argued that the plaintiffs' evidence did not support the specific practices of membership maintenance as of the necessary historic juncture.[81] It argued that 'status' was irrelevant to the treaty commissioners at the time of treaty negotiations; rather, that was a legislative notion that developed subsequently.

> This intervener submits that the acquired rights people are Indians within the meaning of section 91(24) of the Constitution Act of 1867. They are Aboriginal peoples within the meaning of the section 35 of the Constitution Act of the 1982. They are Indians within the meaning of the Indian Act. ... And they are members of a band, according to the Indian Act, by virtue of a scheme of band membership established by that statute, just as are the plaintiffs.
>
> And by virtue of those facts, My Lord, we would submit that whatever Aboriginal right may be established, the persons with acquired rights share it equally with the plaintiffs. ... this intervener's position is that there is an Aboriginal right to control membership. Its content must be highly specific and in the case at bar the evidence does not support the specific nature of the right asserted.[82]
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> ... It is our client's position that the evidence here has not established a specific right that is inconsistent with Bill C-31, that the evidence here has

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[80] Ibid.

[81] Mr. Jon Faulds for the NCC(A), Court transcript, Vol.72, Lillian C. Purdy, C.S.R. Hereafter "Court transcript Vol.72".

[82] Ibid.

> demonstrated practices that are consistent with Bill C-31. Our client's view would be that the evidence of those practices is sufficient, in an appropriate case, to result in a finding of the existence of an Aboriginal right in relation to membership, that such a right is not inconsistent with Bill C-31.[83]

Terry Glancy for the NCC(A) added, "unless you can find as a fact that the specific right claimed has been proved, then any consideration of any general right with respect to the control of membership, whether it be Aboriginal or treaty or one and the same, is essentially a moot point".[84] Essentially, then, the NCC(A) supported the proposition that there is an aboriginal right to the social practice of membership determination, but argued that the plaintiffs had not made their case for the exclusionary practices as the basis for the right and therefore for the infringement of C-31 on such a right. Therefore, NCC(A) argued, C-31 must stand.

Non-Status Indian Association of Alberta

The Non-Status Indian Association of Alberta (NSIAA) is a small organisation of indeterminate membership in the Treaty 7 area, formed primarily to protest the Sarcee Band's exclusionary band membership code.[85] Its intervention sought a dismissal of the case on the grounds that the plaintiffs had not established an aboriginal or treaty right to determine membership, nor could they argue such a right be held exclusively against other aboriginal people.[86] The NSIAA argued that there was no collective right to s.2(d) associational rights.[87] Agreeing with the NCC(A), it argued that section 35(4) of the Constitution Act 1982 subjected all section 35 aboriginal and treaty rights to the principle of equality.

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[83] Ibid.

[84] Ibid.

[85] Statement of Intervention by the Non-Status Indian Association of Alberta, Court No. T-66-86, Filed July 27, 1993.

[86] Memorandum of Fact and Law of the Intervenor Non-Status Indian Association of Alberta, at page 1. Hereafter NSIAA Memorandum.

NSIAA argued that the notions of 'status' and of 'enfranchisement' were "creations of Anglo-Canadian colonial policy".[88] Moreover, membership in bands was determined by the pre-1985 Indian Act, not by custom. The 1985 Act continues to define 'band', which is a "creation of the Indian Act".[89] The new Act devolves certain membership rule-making power to bands, but maintains jurisdiction over band membership codes.[90] In order to assume this power, bands must obtain approval for a proposed membership code from a majority of band electors. Bands may regulate residency, which is separate from status. The continuity of Indian Act regulation and the failure of the plaintiffs to provide evidence of a pre-colonial membership regime consonant with Indian Act regulation must lead to failure of the plaintiffs' claim to an aboriginal and treaty right of membership.[91] "Only practices, customs and traditions which were integral to the aboriginal society at the time of transfer of sovereignty are protected by the common law of aboriginal rights."[92] Moreover, pre-colonial practices were just that: customs and practices, not law as conceptualised in western terms. Therefore, it is inaccurate to speak of 'aboriginal law' relating to membership prior to the Indian Act regime.[93] Citing Lambert J.A. in Delgamuukw,

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[87] Ibid.

[88] Ibid at 2.

[89] Ibid at 3.

[90] Ibid at 4.

[91] Ibid at 5-6.

[92] Ibid at 7.

> Aboriginal rights of self-government and self-regulation do not rest on 'laws'. They rest on the customs, traditions and practices of the aboriginal people to the extent that those customs, traditions and practices formed and form an integral part of their distinctive culture.[94] (emphasis in original)

Following Delgamuukw, a practice must be proved to be integral to aboriginal society at the time of invocation of British sovereignty in order for the common law to protect it as an aboriginal right. However, even the plaintiffs' evidence did not show practices of marital expulsion, and indeed, showed the opposite to have happened.[95] In fact, charged NSIAA, the plaintiffs were actually claiming that "s.12(1)(b) of the Old Act was consistent with the membership practices of their predecessors".[96]

The NSIAA placed little weight on the oral testimony of the plaintiffs' aboriginal witnesses, noting that "their evidence was of contemporary traditions, not past practices".[97] This argument, if proven, is fatal to the plaintiffs, following the Supreme Court's decision in Van Der Peet. Further, the NSIAA asserted that even where bands assumed control over membership pursuant to the 1985 Indian Act, this was in response to a legislative endowment of the Indian Act and not a resurrection of an aboriginal right.[98]

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[93] Ibid.

[94] Cited by the NSIAA at page 8.

[95] Ibid at 22.

[96] Ibid at 18.

[97] Ibid at 12.

[98] Ibid at 14.

The NSIAA notes that the plaintiff bands' codes, and especially that of Tsuu Tina, are reactionary, racist, and directed primarily at women who reacquired status. "These modern exercises seem to have missed the last several generations in development of gender relations, and the concept of marriage and parenthood."[99] Further raising the question of the plaintiffs' motives, NSIAA reports:

> There are 14 members of the Sawridge Band pursuant to 11(1)(c) reinstatement of 12(1)(b) women. The Band refuses to recognize 13 of them, and has refused to even process the applications of most of them although it has applied to DIAND for funding and the individuals' personal files. The one exception is Bertha L'Hirondelle, Chief Twinn's sister who has been granted membership in the band. ... Of all the children born to Sawridge Band members since 1985 only two -- the children of Chief and Catherine Twinn -- have been added to the Band List.[100]

And, of the 'cultural affinity' tests in the membership codes of the three plaintiffs, NSIAA observed that only a small percentage of current members would be able to pass them, though they would not be required to do so. Of Sawridge's test, NSAII notes that it is in English, is 42 pages long, and includes questions such as whether the applicant is HIV positive.[101] However, evaluation of a sample of the specific C-31 applicants to the plaintiff bands shows a high degree of cultural integrity and community involvement; 12(1)(b) women "are as aboriginal as 11(1)(a) Band members."[102]

Of the plaintiffs' concern for the impact of reinstatement, the NSIAA notes that no evidence was provided to show any negative impact at all, while much of the testimony was based on "a misunderstanding of the law" or on any factual base, and was characterised as "wild speculation".[103] NSIAA charged that even the plaintiffs' witnesses responsible for band governance were ignorant of the application of C-31 and that "the Bands had not even informed themselves" of the legislation and related policies and programs.[104]

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[99] Ibid at 16.

[100] Ibid at 16.

[101] Ibid.

[102] Ibid at 22.

Finally, the NSIAA argued that the plaintiffs could not establish themselves as the successors of the aboriginal community which would have an aboriginal right at law, simply because the plaintiffs invoke the Indian Act created band entity as their primary referent, and that is at least partly inconsistent with the ethnographic band entity which was party to treaty and which would be the successors in question.[105] Indeed, treaty rights are held by individuals, not by bands.

In conclusion, the NSIAA argued that section 2(d) of the Charter is an individual right, not available to bands; the plaintiffs' evidence did not show an aboriginal or treaty right to which they were successors; and subsection 35(4) is a curb on the recognition of discriminatory aboriginal and treaty rights.

Native Council of Canada

The Native Council of Canada (NCC) is a non-profit national organisation representing Canadian non-status, off-reserve and Metis peoples. It calculates this amounts to a population of at least 500,000. Many of its members are those who lost status under the old Indian Act, and descendants of those people.[106]

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[103] Ibid at 19.

[104] Ibid at 19.

[105] Ibid at 24-25.

The NCC sought a court ruling that the C-31 sections which Twinn et al. sought to have declared unconstitutional were validly enacted and are constitutionally consistent with section 35(1) and with the rights of bands under the Indian Act.[107] The federal government was required by the Charter to ensure its statutes complied with the section 15 Charter equality guarantees.[108] On the question of whether Charter section 2(d) associational rights were offended, the NCC argued that freedom of association does not include the freedom to "exclude one's kin from statutory benefits, from Charter protection".[109]

The NCC took the position that Indian Act provisions for band membership were confined to the purposes of the Act, and should not affect membership in communities of aboriginal people for aboriginal or treaty rights purposes. (Some months after the Sawridge decision, another court made such a ruling, in a case in which a non-status Indian from an aboriginal community unrecognised by the Indian Act claimed an aboriginal hunting and fishing right. The case supports the proposition that Indian Act bands are not the location, or not the only location, to identify those with aboriginal rights.[110])

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[106] "Opening Statement of the Native Council of Canada", September 22, 1993, at page 3.

[107] Memorandum of Fact and Law of the Native Council of Canada, at 65. Hereafter NCC Memorandum.

[108] Ibid at 5.

[109] Muldoon J., Sawridge, at paragraph 171.

[110] Thomas Claridge, "Ontario loses bid to quash ruling on native game rights", The Globe and Mail, August 10, 1996, at A5.

The NCC criticised the plaintiffs' legal basis for their claim as established by their evidence, and the nature of the claimed right.[111] As an abstract claim to self-regulatory powers, the claim to an aboriginal right to membership determination would not be recognised at common law; the common law supports aboriginal rights taken to be "practices, customs and traditions which were integral to the aboriginal society at the time of transfer of sovereignty".[112] Therefore, the evidentiary proof required is "fact specific: proof of place, people and practice at the time of transfer of sovereignty".[113] The plaintiffs' evidence was not fact specific and indeed, often undermined their case by showing that membership was more fluid and less patrilocal than they claimed.

Then, argued the NCC, if the plaintiffs could establish a right, they were required to show a specific infringement of the right by the impugned legislation. This they could not do, as the C-31 amendments permitted the plaintiff and all other bands to adopt their own membership rules, and policy provisions had been made by the government to assist bands to mitigate the impact of reinstatement.[114]

The NCC characterised the plaintiffs' argument as one for "a constitutionally guaranteed aboriginal right to discriminate as they see fit".[115] The NCC argued that the Crown's fiduciary obligation is to all aboriginal people, not only to status Indians in Indian

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[111] NCC Memorandum, at 12.

[112] Ibid at 12-13.

[113] Ibid at 13.

[114] Ibid at 20-21, and at 30.

[115] Memorandum of Fact and Law of the Native Council of Canada, Court No. T-66-86, at page 4.

Act bands.[116] C-31 is an imperfect compromise, but a "valid exercise of legislative power".[117]

The Federal Court's Decision

The Court decided that "(t)he plaintiffs' asserted right to control their own membership of their "bands" (a wholly statutory term) was emphatically extinguished by the Indian Act, 1876."[118] Apparently, then, the Court supported the proposition that there had been such a right, although it had been extinguished by federal legislation. The Court dismissed the plaintiffs' claim for a declaration that sections 8 to 14.3 inclusive the Indian Act, as amended by C-31, violated their section 35 constitutional rights to determine their own membership. It dismissed the plaintiffs' alternative claim that the imposition of 'new' members amounted to a violation of the plaintiffs' section 2(d) associational rights. It then required the plaintiffs to pay the defendant and the intervenors their costs.

The decision notes the conflicting evidence on the plaintiffs' claim that the Indian Act series of legislation essentially confirmed a right to determine band membership. The Crown and the intervenors produced expert, legal and historical evidence to show precisely the contrary: that the state, through the Indian Acts though not only through the Indian Acts, had moved to control band membership in conformity with state cultural and legislated policy. The Crown, in particular, took the view that section 91(24) of the Constitution Act 1867 gave Parliament the exclusive authority to legislate in regard to "Indians and lands reserved for the Indians", and the subsequent legislation was a constitutional exercise of this authority.

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[116] Ibid at 29.

[117] Ibid.

[118] Sawridge unedited verbatim transcript, at paragraph 72.

In answer to the plaintiffs' claim of an aboriginal right, confirmed by treaty, to determine band membership through the practice of the alleged tradition of "woman follows man", he decided that, if the practice ever was definitive (and the evidence was not compelling[119]) then it was "utterly extinguished" by the operation of section 35(4) of the Constitution Act of 1982.

> (I)t can be clearly seen that the marital custom, the so-called aboriginal and treaty rights which permit an Indian husband to bring his non-Indian wife into residence on a reserve, but which forbid an Indian wife from so bringing her non-Indian husband are extinguished utterly by subsection 35(4). ...
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> That constitutional provision exacts equality of rights between male and female persons, no matter what rights or responsibilities may have pertained in earlier times. ... section 35 is in effect an "Indian provision" in an otherwise largely anti-racist constitution, and it speaks deliberately and specifically to the diminution of past inequalities between Indian men and women.[120]

Despite the plaintiffs' claim that an aboriginal right to determine band membership survives the 1985 Indian Act, the court was convinced that 35(4) of the Constitution Act 1982 inhibited any aboriginal right to determine membership in a discriminatory fashion.

> The plaintiffs are firmly caught by the provisions of section 35 of the Constitution Act which they themselves invoke. The more firmly the plaintiffs bring themselves into and under subsection 35(1) the more surely subsection 35(4) acts upon their alleged rights pursuant to subsection 35(1)

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[119] Indeed, the lack of evidence supporting customs and practices demonstrating such a right was flagged by the court early on in the case, and that lack was never remedied. "(I)n my view they have not properly provided particulars of facts on which they intend to rely...". Strayer J., Reasons for Order, May 20, 1987, at 4, cited in Defendant's Memorandum at 4.

[120] Sawridge, at paragraphs 22-24.

> which, therefore are modified so as to be guaranteed equally to the whole collectivity of Indian men and Indian women.
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> If ever there was or could be a clear extinguishment of any alleged aboriginal or treaty right to discriminate within the collectivity of Indians and more particularly against Indian women, subsection 35(4) of the Constitution Act is that; and it works that extinguishment, very specifically, absolutely, and imperatively.[121]
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> So, since the expression of an aboriginal right cannot have a gender discrimination, one can say that any aspect of the right which would have permitted the collectivity to discriminate on the basis of gender is extinguished, it's gone. And it's gone at least as of, if you wish, 1983.[122]

That is, any continuing aboriginal or treaty right which may rely on gender discrimination is extinguished to the extent that it so discriminates.

And, on the question of whether the plaintiffs section 2(d) Charter rights were offended, the Court found no infringement, but decided that to the extent of any hypothetical infringement, it was justified on section 15 equality grounds. "Fairness is one of the foundations of the Charter and if the plaintiffs invoke it, they cannot choose only paragraph 2(d)."[123]

Were the plaintiffs self-determining at the time of treaty negotiation, in the mid to late 19th century? The answer to this question had to be affirmative for the court to find that the treaties protected socio-cultural practices to the extent that they did not extinguish them. In reviewing this, the court considered whether the plaintiffs were sovereign at the time of treaty negotiation, and found that they were not. The treaties, therefore, could not protect powers which had been terminated by the exercise of colonial law prior to treaty negotiation.

Justice Muldoon takes the 1670 Hudson's Bay Company Charter as the definitive assertion of English sovereignty. The Charter gave commercial control of Rupert's Land "not already actually possessed by or granted to any of our Subjectes or possessed by the

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[121] Sawridge, paras. 21 and 22.

[122] Court transcript, Vol.77.

[123] Sawridge at paragraph 172.

Subjectes of any other Christian Prince or State"[124] to the Company, and required that land (the extent of most of which of which was unknown) be known as a "plantacion or colonye". It also permitted the Company to establish courts of civil and criminal jurisdiction in Rupert's Land; that is, to act on behalf of the Crown, in accordance with the Crown's law. It is the granting of this commercial charter by the British Crown to the Hudson's Bay Company that the federal court takes to be definitive of the existence of the Crown's sovereignty: "In order to grant the Hudson's Bay Company Charter in May, 1670, it is logically apparent that the Crown must have already asserted sovereignty" ... "The HBC in effect was, until [the Rupert's Land Act of] 1868, the ultimate instrument of the Crown's claim of sovereignty ...".[125]

This assertion brought with it British common law and through the remarkable alchemy of colonial mythology, established it as authoritative and uncontestable: "(T)he assertion of sovereignty made aboriginal peoples subject to laws of general application ... To the extent that those general laws impinged on or extinguished aboriginal rights to such extent they were diminished."[126] The mere assertion of crown sovereignty and its legislative emanations is deemed to diminish aboriginal rights. Now, in contemporary times, existing law applies to indigenous peoples provided it does not abrogate legislatively unmodified existing 35(1) aboriginal rights.[127]

> The Court finds that the assertion of English sovereignty, later to become British sovereignty, was first made by the HBC Charter, May 2, 1670. Any rights which the plaintiffs can successfully establish must have been exerted before that day, and must not have been extinguished before the coming into force of subsection 35(1) of the Constitution Act 1982, and must withstand subsection 35(4) thereof.[128]

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[124] Ibid at paragraph 26.

[125] Ibid at paragraph 27.

[126] Sawridge at paragraph 45.

[127] Ibid at paragraph 47; see also the effects of the Sparrow decision, described earlier in this chapter.

[128] Sawridge verbatim unedited transcript, at paragraph 38.

Emphasising this point, Muldoon J. wrote in his decision that:

> The HBC in effect was, until 1868, the ultimate instrument of the Crown's claim of sovereignty on all of the western plains to the Rocky Mountains ... The Constitution Act, 1867, and the Rupert's Land Act, 1868, complete the story of the sovereignty claim.[129]

The Royal Proclamation of 1763 further consolidated the Crown's sovereignty claim made by the issuance of the HBC Charter. The Royal Proclamation created four colonial governments -- Quebec, East Florida, West Florida, and Granada -- to establish British law and governance in territories ceded to the Crown under the Treaty of Paris. The Royal Proclamation also extended the assertion of Britain's sovereignty from the colonial territories here named and the Hudson's Bay Company domains, to "all the Lands and Territories lying to the Westward of the Sources of the Rivers" which drain north and northwest of these domains. British sovereignty accompanied a handful of mercantilists under royal license, and extended both their commercial privilege and the reach of the Crown's claims and the common law to lands the extent of which was unknown to those who claimed them -- the classic terra incognita.

Was the alleged right grounded in tradition? Tradition, Muldoon wrote, is evidence of cultural practice that manifests aboriginal rights. He found support for this in case law precedent, in Delgamuukw:

> The common law will give effect to those traditions regarded by an aboriginal society as integral to the distinctive culture, and existing at the

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[129] Sawridge, paragraph 27.

> date sovereignty was asserted. The Constitution Act, 1982, protects those aboriginal rights which still existed in 1982.[130]

However, the tradition of 'woman follows man' was determined to be of more recent origins: "The Court finds that the plaintiffs have ex post facto adopted the harshness of the 1869 statute, and in true revisionist fashion, asserted that that Act of Parliament in 1869 expressed the aboriginal 'rule' of membership control from time immemorial."[131]

But did the court find the alleged right to exist, and has it survived importation of colonial law, the creation of the treaties, and the flow of history to the present? On the existence of the right to control membership, evidenced by cultural practices and in particular, clothed by the practice of 'woman follows man', the evidence was at best inconclusive and at worst contradictory.[132] The court decided that the adage 'woman follows man' was not proven, and indeed, was not true.[133] The Crown's experts were more convincing than the plaintiffs',[134] and the evidence adduced in cross-examination showed a lack of consensus among different members of the plaintiff bands and among disparate members of the aboriginal community in general. Indeed, some of the plaintiffs' own evidence was contradictory on this score, and the historical reality of membership practice was demonstrated to be flexible, inclusive, and while primarily patrilineal and patriarchal on the part of the plaintiff bands, was not exclusively so. Finally, the court stated that a discriminatory regime that forced women to assume the status of "their fathers' daughters or their husbands' wives or widows"[135] could not be dignified as a collective 'right', as it could at best only represent a collective right for men.

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[130] Delgamuukw v. British Columbia [1993] 5 WWR 97 at p.124, para. 43.

[131] Muldoon J. in Sawridge, at paragraph 139.

[132] See, for example, Muldoon J.'s comments about the contradictory and incredible testimony of Wayne Roan, in Sawridge at paragraphs 106-107, showing Mr. Roan's father had switched band membership to his wife's; that is, followed his wife.

[133] Sawridge at paragraph 131.

[134] Indeed, the court writes of one of the experts that "the depth and care of Prof. Moore's field work and conclusions left much to be desired". Of the Crown's expert witness, however, the court writes of him as a "more careful and organized professional, and the more resilient and reasoned in cross-examination. The Court prefers his testimony wherever it conflicts with Prof. Moore's report ...". Sawridge at paragraphs 140 - 142.

While the treaties did not appear to explicitly eliminate a right such as self-determination of membership, subsequent legislation in the form of successive Indian Acts did so. Justice Muldoon wrote that "(t)he plaintiffs' asserted right to control their own membership of their "bands" (a wholly statutory term) was emphatically extinguished by the Indian Act, 1876."[136] But ultimately, the decision rested on the finding that subsection 35(4) of the Constitution Act 1982 can extinguish a custom-based aboriginal and treaty right if that right requires gender discrimination for its exercise.[137] Indeed, subsection 35(4) "speaks deliberately and specifically to the diminution of past inequalities between Indian men and women."[138]

Did the alleged right to control membership survive the creation of the plaintiffs' treaties? The court noted that aboriginal rights survived the treaties unless they were expressly terminated by them, and if they survived and had not been properly limited by legislation in the interim, they are now constitutionally protected by section 35.[139]

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[135] Sawridge at paragraph 103.

[136] Ibid. at paragraph 72.

[137] Ibid at paragraphs 20 - 24.

[138] Ibid at paragraph 24.

> Some aboriginal rights were clearly extinguished by the three treaties invoked by the plaintiffs, but those unspecified aboriginal rights which are not the subjects of the treaties are not so extinguished and, if not subsequently extinguished by competent legislation, including constitutional disposition, for example, subsection 35(4), they must logically continue in existence whatever they be. They are in fact referred to as "the existing aboriginal rights", in subsection 35(1)."[140]

The plaintiffs had argued that the aboriginal right to determine band membership had been incorporated in their treaties in an implied non-specific fashion, and further, that the various Indian Acts had conformed with this right, so as to create further evidence and support for it; and indeed, were even intentionally crafted so as to conform to the practices which expressed this right. The Court noted that the first of the Indian Acts existed when the plaintiffs' treaties were negotiated[141] and noted the increasingly stringent patriarchal status criteria as the Acts evolved.

The Court noted:

> The control and the manner and expression of the control of the identity of Indians, the exclusion of half-breeds, the definition of a band, the protection of reserves, the creation of an officer, the Superintendent-General, and the enactment and invocation of the criminal law which only the State can do, the subjection of both Indians and non-Indians alike to the law, civil and criminal ... enacted entirely pursuant to Parliament's heads of legislative power, all demonstrate that the plaintiff's argument is founded on the wrong premises. In fact membership, use, occupation and benefit of Indian lands

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[139] Ibid, at paragraph 47.

[140] Ibid at paragraph 47.

[141] Ibid at paragraph 64.

> was not asserted by the plaintiffs' putative ancestors and predecessors in the least degree.[142]

Muldoon J. insisted that treaty references to "'the Crown' and 'the Queen' meant Canada – not the Court of St. James."[143] Having located sovereignty in the emergent Canadian state, he goes on to state that Indians, at the time of signing of the plaintiffs' treaties, were Canadian citizens.[144] By way of example, Muldoon points out that in Treaty 7, the Morris record proves that "the Indian parties to treaty 7 clearly understood" that the treaty commissioners represented the Canadian government, its law, and particularly the Indian Act.[145]

Returning to Morris's records, Muldoon held that the exclusion of half-breeds by Morris, despite petition by certain Indian negotiators, "demonstrates quite conclusively that if there were an aboriginal right of control of membership it was conclusively extinguished at treaty time and as a condition of concluding the treaty."[146] Identifying the way in which political structure and content were dictated by the Indian Act, he suggested that Indian parties were controlled externally and that traditional practices were disintegrating due to a number of factors. "Clearly, a people who were experiencing the setting-up of false, puppet chiefs and social granulation "into little parties" due to the includence of traders, cannot be believed to be controlling its own membership."[147] Muldoon asserted that Indians requested government control and acknowledged their loss of political control at the time of treaty signing.[148] Nor did he accept the proposition that Indian signators did not understand the implications of the treaties. "The Courts, too often and too much, pretend that the Indians did not understand their bargained treaties."[149]

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[142] Sawridge at paragraph 71.

[143] Sawridge at paragraph 74.

[144] Sawridge at paragraph 71.

[145] Sawridge at paragraph 80.

[146] Ibid at paragraph 84.

[147] Muldoon J., Sawridge, at paragraph 86.

[148] Ibid.

In sum, the Muldoon decision finds that any right the plaintiffs may have had to control band membership was extinguished by the 1876 Indian Act. Section 35(4) of the Constitution Act 1982 requires sexual equality of all aboriginal and treaty rights protected by section 35. The plaintiffs' associational rights under section 2(d) of the Charter were not infringed, but even if they had been infringed, it would be justified on section 15 equality grounds. More problematically, the decision finds that colonial law had terminated aboriginal sovereignty before treaty negotiation and so sovereignty could not be protected by treaty. While the decision stands for sexual equality of Indian men and women in relation to aboriginal and treaty rights, it also stands for the proposition that colonial law was uncontestable from the moment of its assertion, no matter how objectively ludicrous or offensive such assertion was. The decision upholds the proposition that traditional practices clothe rights, effectively limiting rights to pre-colonial practices, subject to legislative modification by the federal government.

Conclusion

The Sawridge case has been costly. Information obtained by The Vancouver Sun from the Department of Indian Affairs on payments made under its test-case program, which funds precedent-setting cases, indicates that "Alberta Senator Walter Twinn, chief of the Sawridge Indian band, received almost $1 million in his unsuccessful fight to overturn Bill C-31".[150] As well, the Federal Court assessed tariff costs to the plaintiffs, to the tune of $460,000 to the defendant, $145,000 to the Native Council of Canada, (Alberta), $130,000 to the Non-Status Indian Association of Alberta, and $138,000 to the Native Council of Canada.[151] However, the $1 million test case funding is not required to be repaid.

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[149] Ibid at paragraph 87.

[150] "Taxpayers pay $14 for bands' legal battles", The Edmonton Journal, June 21, 1996, B7.

[151] Judgement, T-66-86, November 7, 1995.

On September 27, 1995, the appellants filed notice of appeal with the Federal Court of Appeal.[152] The next hearing of that case is in June of 1997, in Edmonton. It is most likely that, regardless of the decision of the appellate court, the case will find its way to the Supreme Court of Canada. This time-consuming and costly exercise will further delay the ability of those who have been denied band membership and its concomitant rights from enjoying the benefits of those rights, and, as the Crown observed to the Court, many of the reinstatees are aging.[153]

Without minimising the issue of self-determination for aboriginal nations, the plaintiffs' case may not be the best vehicle to explore this issue juridically. Their case is weakened by at least three important deficiencies. First, the plaintiffs are shown on the evidence to be using the rhetoric of rights and tradition to obtain an exemption from the requirements of normal legislation and constitutional rights legislation, in order to exclude members of their own communities and, in some cases, of their own families. The repugnance this arouses in many in both the aboriginal and the non-aboriginal communities has a normative base that should not be easily dismissed. Second, as shown in Chapter Two, the plaintiff Chief/Senator Walter Twinn and the Sawridge band are demonstrated to be wealthy; hardship is no argument here. The Sawridge band, on certain evidence and in the Crown's pleadings, appears to be a carefully controlled corporate operation, whose objective is to limit the band equivalent of shareholders. While the Ermineskin band declined to show evidence of its financial affairs, it may well be pursuing a similar strategy: Ermineskin is one of the wealthier bands in Canada. Third, the plaintiffs' own evidence produced by testimony was highly problematic, and the plaintiffs' expert witness, Dr. Moore, was entirely discredited in cross-examination. The plaintiffs had argued that traditional (ie. pre- colonial) practices were manifestations of aboriginal rights, which in the case of the right to determine band membership, were transubstantiated to an implied treaty right.[154] The Court had agreed with the proposition that cultural practices 'clothed' an aboriginal right. However, the court was apparently convinced by the defendant and by the expert testimony of Alexander von Gurnet, who wrote: "Membership in groups was thus determined essentially more by a process described as 'self-inclusion' rather than by a process of exclusion and elimination through veto cast by the band members."[155] The Court decided that the plaintiffs had not proven the alleged customs, and so could prove no right at law, and no right could then be incorporated within a treaty.

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[152] Schedule A to the appellants' notice of appeal to the Federal Court of Appeal dated September 27, 1995, Overview of Grounds of Appeal.

[153] Defendant's Memorandum at 92.

[154] The Plaintiffs' pleadings, court transcript, Volume 77.

Unfortunately, the Sawridge case gives the appearance of an ex post facto set of arguments manufactured to justify discriminatory practices intended to reinforce an exclusionary patriarchy and to protect oligarchical class interests. The plaintiffs' weak evidence and opaque and often contradictory testimony provided a poor legal foundation for a potentially significant constitutional case. Argumentation advanced on the basis of testimony grounded in erroneous assumptions and misinformation is off to a bad start.

If Sawridge does proceed to the Supreme Court of Canada, the plaintiffs will have to prove that their membership determination based on gender discrimination is an integral part of its distinctive culture, originating before European contact. In August 1996, the Supreme Court of Canada heard the appeal of Van Der Peet, a fishing rights case involving a member of the Sto:lo nation, and held that an aboriginal right is composed of "a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right".[156] In Van Der Peet, selling fish for money was held not to be an aboriginal right because the plaintiff had "failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo culture which existed prior to contact and was therefore protected by S.35(1) of the Constitution Act, 1982.[157] The Court held:

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[155] Dr. Alexander von Gurnet, Expert Witness for the Crown, cited in the Defendant's Memorandum, at 54-56.

[156] "How to identify an aboriginal right", Verbatim excerpts from the Van Der Peet decision, The Globe and Mail, August 23, 1996, A17.

[157] Ibid.

> To be integral, a practice, custom or tradition must be of central significance to the aboriginal society in question – one of the things which made the culture distinctive. ... The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact with European society. ... The fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. A practice, custom or tradition will not meet the standard for recognition of an aboriginal right, however, where it arose solely as a response to European influences.[158]

This reasoning is problematic, for it recognises as authentically aboriginal (and therefore as rights) only those cultural practices which have been maintained in a pre-colonial and therefore decontextualised fashion. As John Borrows warns, it focuses on "what was 'once upon a time' ... not necessarily about what is central, significant and distinctive to the survival of these communities today".[159] Logically, it supports arguments that there are by definition virtually no aboriginal practices that attract constitutional protection; and if cultural change and syncretic incorporation are evidence of dilution rather than vitality, it suggests by implication that there are virtually no authentic aboriginal cultures, and therefore, no aboriginal peoples.

Rights, however, have seldom been taken to be absolute. Setting aside the perennial question of how to determine normative values, to whom they apply and who decides, incorporation of a contemporary ethical framework in contemporary and relevant terms should not, following Van der Peet, eliminate the value of rights claims. Rather, such vitality and capacity for temporal relevance may equally 'clothe' rights.

Last but not least, the decision stands for the proposition of the uncontestability of the historic colonial depradations against indigenous nations, now legitimised in law. Even the exited women and their lobby organisations are unlikely to applaud this part of the Muldoon decision. And while obiter and not relevant to the substance of this decision,

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[158] Ibid.

[159] John Borrows, "The Trickster", at 29.

Muldoon criticised the Constitution Act 1982 for including the Metis as aboriginal peoples, comments certain to be invoked in future cases contesting the scope of aboriginal rights for the Metis.[160] Nor did Muldoon have much respect for the veracity of oral history, an essential component of most aboriginal and treaty rights claims.[161]

If, as the court and the plaintiffs seemed to agree, custom is determinative of an existing aboriginal or treaty right, then there can be no aboriginal or treaty rights that are not grounded in historical practices. Indeed, historical social practice comprises the corpus of contemporary rights. This, if followed logically down even a short path, leads to the conclusion that there are no inherently repugnant customs or traditions, nor may they be challenged with contemporary rights discourse. The consequence is a consolidation of tradition in what amounts to a fundamentalist version of aboriginality. The feminist movement has identified tradition and social practices as the primary sites of women's oppression. The plaintiffs' formulation would eliminate feminist and other egalitarian critique of any indigenous practices grounded in custom.

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[160] Justice Muldoon said, "the Metis can hardly be thought of as 'aboriginal', having been a people only since the advent of the European people". Sawridge verbatim transcript at para. 18. Again, at para. 38, he writes: "It must be left to others at another time to explain how the revisionists who settled upon subsection 35(2) thought that they could honestly characterize Metis people as aboriginal people, wielding aboriginal rights."

[161] Apparently unable to distinguish human nature from the mode of transmission of cultural myths, Muldoon J. wrote: "That surely is the trouble with oral history. It just does not lie easily in the mouth of the folk who transmit oral history to relate that their ancestors were ever venal, criminal, cruel, mean-spirited, unjust, cowardly, perfidious, bigoted or indeed, aught but noble, brave, fair and generous, etc. etc." Sawridge verbatim transcript at para 109. Obviously the good judge needs to deconstruct some written history.

Chapter Four
Negotiating Rights and Traditions

Introduction

In the Sawridge case, the plaintiffs argued for the right to implement exclusionary band membership practices as an exercise of aboriginal and treaty rights. This argument hinges on the integrity of coherent band entities with hierarchical political structures which, historically and as a result of treaty agreements, control both reserve lands and the boundaries of the group entitled to their use and benefit. The traditional expression of this right, according to the plaintiffs, is captured in the phrase "woman follows man", meaning that patrilocality was a virtual rule establishing women's socio-political identity as derivative of men's. However, neither the evidence submitted in Sawridge nor the sources and practices of traditions invoked by the plaintiffs provides much support for this argument. Further, there is no apparent theoretical justification of traditional practices that axiomatically supersede human rights arguments, either for cultural viability or as hierarchical rights claims. In this chapter I argue that there is no inherent difficulty in reconciling traditions with contemporary rights claims, and that, where reconciliation requires compromise, it must be in favour of protection of fundamental human rights.

Literature discussing the relative social and cultural importance of collective and individual rights has examined individual location within socio-cultural organisation as well as the importance of self-definition. Much of the debate posits the incommensurability of individual and collective rights.[1]

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[1] See, for example, Judith Baker (ed.), Group Rights, University of Toronto Press, 1994; Menno Boldt, Surviving as Indians: The Challenge of Self-Government, University of Toronto Press, 1993; Charles Taylor, Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism (Guy Laforest, ed.), McGill-Queen's University Press, Montreal & Kingston, 1993; Charles Taylor, Multiculturalism and "The Politics of Recognition" (Amy Gutman, ed.), Princeton University Press, Princeton, New Jersey, USA, 1992; Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights, Clarendon Press, Oxford, 1995; Patricia Monture-Angus, Thunder in my Soul: A Mohawk Woman Speaks, Fernwood Publishing, Halifax, Nova Scotia, 1995.

The discussion is usually framed in terms of tensions between social organisations, especially the privileging of law conceptualising the individual as part of a collectivity, with the survival of the collectivity being paramount to any individual's claim upon it. Alternatively, the discussion is framed as the rights of individuals in relation to the collectivity, with its superior power to oppress through law and policy. Therefore, aboriginal women's rights are discussed in dualistic terms: of either women's rights or aboriginal rights; of either sex discrimination protection or self determination; of either solidarity of indigenous women with implicitly gender-neutral indigenous movements, or affiliation with and co-optation by 'white' feminists; or of defending indigenous collective values and traditional sex roles or undermining these in favour of the western liberalism of the colonial oppressor.[2]

This dualistic and oppositional construction mischaracterises both the western liberal and the indigenous conceptions of individual and society. There is no inherent contradiction between protecting the dignity of the individual within the collectivity and the viability of the collectivity. There is no axiomatic virtue in traditions of either western liberal societies or traditional indigenous ones. Solidarity among women who identify processes of sex oppression does not equate with anti-collective, anti-indigenous stances. Perhaps the individual - collective rights debate is a bit of a red herring, usefully occupying the intellectual and political energies of those who seek to engage in the debate without being labelled 'oppressor'.

While recognising the historic and continuing relations of oppression between indigenous and settler societies, I conclude that the oppression of segments of populations in the name of tradition is never legitimate. To the extent that contemporary oppression is directed especially at women and most particularly at feminist women, both the state of

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[2] See, for example, Kathleen Jamieson, Indian Women and the Law in Canada: Citizens Minus, Advisory Council on the Status of Women and Indian Rights for Indian Women, Supply and Services Canada, Ottawa, 1978; Janet Silman, Enough is Enough: Aboriginal Women Speak Out, The Women's Press, Toronto, 1987; Sally Weaver, "First Nations Women and Government Policy, 1970-92: Discrimination and Conflict", Changing Patters: Women in Canada (2nd) (Sandra Burt, Lorraine Code, and Lindsay Dorney, eds.), McClelland & Stewart, Toronto, 1993.

Canada and indigenous nations are bound to affirm the fundamental human rights of women regardless of strategic or traditional considerations.

In this chapter, I examine the tensions between rights claims of individuals within nations which are themselves located within the colonial state of Canada. I consider the legitimacy of traditions which support or detract from rights claims, and examine the historical record on the practice of the traditions claimed by the plaintiffs. I outline how the plaintiffs in Sawridge invoke both rights and tradition to support their contention that involuntary exit of women from their communities of origin is defensible practice, despite its prima facie violation of these women's rights. Next, I examine the utility of the construct of rights, and then move to the question of tensions between individual and collective rights. I take up and reject the proposition that defence of difference might usefully replace defence of rights as a guiding juridical principle. I consider the question of whether the Charter should apply to indigenous governments, and what the implications of that application are for indigenous and women's human rights.

Rights as Islands of Empowerment

Patricia Williams writes: "In the law, rights are islands of empowerment. To be unrighted is to be disempowered, and the line between rights and no rights is most often the line between dominators and oppressors."[3] Rights, then, are held in social context to empower those who would otherwise be vulnerable to enforced relations of subordination. Rights not only define personal autonomy, but also relationships. Indigenous women resisting involuntary exit from their cultural communities and oppressive relations within those communities have invoked the language of rights. While rights discourse has been criticised as possessory, individualistic, and leading to reliance on the state instead of on socio-political movements, it should not be dismissed out of hand as it can also "affirm human values, enhance political growth, and assist in the development of collective identity".[4] How are rights to be held -- individually, collectively, or both? Elizabeth Schneider writes that "Rights claims reflect a normative theory of the person, but a normative theory can see the rights-bearing individual as isolated or it can see the individual as part of a larger social network."[5] The libratory and constricting aspects of rights discourse are dialectical, and emerge as moments in a process of tension and temporary resolution.[6] That is, rights as claims against social and political power stand for the proposition that power is not intrinsically sufficient to justify its exercise over the opposition of those who hold what we call 'rights'. Rights, then, are not only islands of empowerment, but shields against the weapons of power. Rights stand for the proposition that human beings are inherently worth something apart from their standing in the social and political hierarchy, and delimit the boundaries at which hierarchical privilege must stop and the socio-political conditions that especially state power must maintain. But these rights are not immutable in the way a physical shield would be. They are arguments, grounded in philosophy, ethics, politics and economics, whose force is conditional on convincing power that the arguments are valid even when the practice of rights puts pause to power.

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[3] "On Being the Object of Property", The Alchemy of Race and Rights: A Diary of a Law Professor, Harvard University Press, 1988, at 177.

Rights, which have been conceptualised as concretised formal abstract legal claims, are also connected with praxis, "the active role of consciousness and subjectivity in shaping both theory and practice".[7] That is, rights claims not only define individual and collective experience, but lead to politicisation and activism of individuals with a consciousness of entitlement, in relation to the institutions of power that structure their lives.[8] They facilitate the practice of citizenship. Schneider argues that, thus contextualised, rights discourse contributes to self-definition, "in connecting the individual to a larger group and community, and in defining the goals of a political struggle".[9] Rights discourse is normative and idealistic, identifying the minimal parameters of social desirability and serving as a catalyst for social change, crystallising collective identity and challenging the hegemonic order against which rights claims are made. It is "a vehicle of politics and an affirmation of who we are and what we seek".[10]

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[4] Elizabeth M. Schneider, "The Dialectic of Rights and Politics: Perspectives from the Women's Movement" [1986], in Feminist Legal Theory: Readings in Law and Gender (Katharine T. Bartlett and Rosanne Kennedy, eds.), Westview Press, Boulder, 1991, at 320. Hereafter "The Dialectic of Rights and Politics".

[5] Ibid at 318.

[6] Ibid.

[7] Ibid at 321.

[8] Ibid at 322.

The formulation of rights arises from historical experience and political analysis, and culminates in contestation of the hegemonic order via praxis directed at transformation. This process both contests and asserts identity. Seen thusly, rights discourse is simultaneously individual and communal. Nor is it static. The dialectical process of contestation and resolution creates new issues and analyses on the foundation of the old. At the same time, rights discourse typically frames conflict in a hierarchical competitive formulation which may "obscure the basis on which competing interests are accommodated".[11]

It is because of relations of subordination that indigenous politicians now invoke rights against the Canadian state. The rights claimed are on the basis of history -- that is, as a consequence of aboriginality, and of treaties made between those who were here when others arrived here to set up the politico-economic alliance of Canada. The Royal Commission on Aboriginal Peoples (RCAP) defines aboriginal peoples as the "organic political and cultural entities that stem historically from the original peoples of North America" and defines aboriginal nation as "a sizeable body of Aboriginal people who possess a shared sense of national identity and constitute the predominant population in a certain territory or collection of territories".[12] Aboriginal rights, then, are historically and politically located, and are distinct from minority rights in the face of a dominating majority.

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[9] Ibid at 341.

[10] Ibid at 331.

[11] Ibid.

[12] Royal Commission on Aboriginal Peoples, Restructuring the Relationship, Vol.2, Supply and Services Canada, 1996, at 107.

Self-government assumes the existence of distinct peoples, with pre-existing or co-existing rights[13] and its realisation means differentiated citizenship of these peoples within the state. That is, citizenship is on the basis of membership in nations within the state. This differentiated citizenship is required in order to respect the rights of persons in relation to identity, culture, and self-determination as peoples, and is qualified by the hegemony of contemporary states in structuring social and political relations.

The premier component of the aboriginal rights package is the right to 'self-government', deriving from historical relations and from the internationally recognised right to self-determination. The Royal Commission on Aboriginal Peoples concludes that "the right of self-determination is vested in all the Aboriginal peoples of Canada (and) finds its foundation in emerging norms of international law and basic principles of public morality".[14]

Because of the arguably illegal and unethical subordination of indigenous nations to colonial interests, these nations hold a compelling claim against the state as a direct consequence of this historical relationship. Aboriginal rights, then, are invoked in relation to those who subordinated aboriginal nations, and aboriginal rights as such exist only because of those same relations of subordination. They are a claim against the colonial state, not against the Creator, and not as a consequence of culture or tradition or because of minority status in the state.[15] Aboriginality, or indigeniety, is itself a product of colonial relations and does not arise except where land, wealth and power is stolen by others. The definition of 'indigenous' used by the United Nations Working Group on Indigenous Peoples includes anteriority in territory, non-dominance in the current political structure, and the search for cultural and political self-determination.[16] It includes those populations whose symptoms resemble the indigenous situation.

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[13] Kymlicka, Multicultural Citizenship, at 182.

[14] Royal Commission on Aboriginal Peoples, Restructuring the Relationship, Vol.2, Supply and Services Canada, 1996, at 173.

[15] Menno Boldt, Surviving as Indians: The Challenge of Self-Government, University of Toronto Press, 1993, at 26. Hereafter Surviving as Indians.

The RCAP ties sovereignty to identity, and frames it as a right "of all human beings to define, sustain and perpetuate their identities as individuals, communities and nations".[17] It argues that sovereignty is "an inherent human quality" expressed as self-determination, which is the exercise of the choice inherent in sovereignty.[18] Self-government, then, becomes one of a range of choices consequent to sovereignty, but is an expression of nations, not individuals or 'small local communities'.[19]

Aboriginal rights require the state of Canada to restrict itself in certain ways from interference with indigenous governments, and to move proactively in other ways to support the realisation of the right of self-government. Self-government is not a demand for inclusion in the state, but for autonomy from its universal mechanisms (although increasingly it concedes at least economic incorporation).

If self-government is an aboriginal right invoked against the occupying state, it is also a right claimed by identifiable communities who share the attributes of nationhood.[20] The rights of nations are the rights of peoples, the politically significant entity in international law. The right of self-government, then, translates into a challenge to the legitimacy of the state because of its initial practices in relation to indigenous nations. In

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[16] The Working Group reports to the Sub-Committee on the prevention and discrimination and protection of minorities, which in turn reports to the United Nations Commission on Human Rights, which reports to the ECOSOC, which reports to the United Nations.

[17] Royal Commission on Aboriginal Peoples, Restructuring the Relationship, Vol.2, Supply and Services Canada, 1996, at 108.

[18] Ibid at 108.

[19] Ibid at 166.

[20] I like Will Kymlicka's definition of nationhood: "a historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and culture". Multicultural Citizenship: A Liberal Theory of Minority Rights, Clarendon Press, Oxford, 1995, at 11. To this, I would add the sense of political self-consciousness in relation to other nations; that is, a sense of boundary and of common future.

James Graff's formulation, if there is a right to self-determination, then it is a right to choose statehood within an existing state's territory, or "some other mode of governance".[21] The right is held by a people, which is conceived of as either a citizenship body or an ethnocultural collectivity.[22] The choice is relational, can evolve over time, and a people must consent to its government's existence.[23]

Properly claimed by peoples, governance or self-determination is a right that cannot be exercised by individuals. The Royal Commission on Aboriginal Peoples takes the position that the inherent right of self-government is vested in nations, not in local communities. So does the Native Women's Association of Canada.[24] This right is only meaningful in relation to community; to a people. Individuals have rights in relation to governments, and as human beings, while peoples have rights in relation to other political entities because of what they hold in common.

How, then, can we situate indigenous nations within Canada, claiming rights against the state, as well as rights to determine relations with individual aboriginals without regard to the universal standards of human rights? Put bluntly, self-government is an invitation to the colonial state to 'butt out' of the internal governing arrangements of the self-governing nation. This right is invoked because of and in defence of cultural integrity as well as political legitimacy; as sovereignty. Culture becomes conflated with nation, and invoked in opposition to the colonial state. Culture becomes both resistance and authenticity. It is an essential mirror of self-hood.[25] Culture becomes fixed now as what it was then: change is treated as illegitimate. Culture is used selectively, as a tool for cohesiveness and il/legitimacy. And culture is insulated from internal critique by forms of discipline that are designed to eliminate dissent.[26] That is, the right of self-government, located and defined historically, is resistance to colonial domination and simultaneously is also potentially an abusive mechanism for minorities within the self-governing nation and a stultifying mechanism in relation to socio-political evolution, unless there are human rights protections guaranteed to individuals in relation to even indigenous governments. As Avigail Eisenberg writes, "Community traditions and standards are the potential foes from which individuals need protection."[27]

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[21] James Graff, "Human Rights, Peoples, and the Right to-Self-determination", Group Rights (Judith Baker, ed.), University of Toronto Press, 1994, at 186. Hereafter "Human Rights, Peoples, and the Right to Self-determination".

[22] Ibid.

[23] Ibid at 187.

[24] Royal Commission on Aboriginal Peoples, Restructuring the Relationship, Vol.2, Supply and Services Canada, 1996, at 234-35.

[25] Charles Taylor, Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism (Guy Laforest, ed.), McGill-Queen's University Press, Montreal & Kingston,

The Royal Commission on Aboriginal Peoples documented a range of women's voices warning of the need for balancing traditions with rights, and self-determination with mechanisms of accountability such as rights documents. Native women called for "a values clarification process within the context of reviving traditional values" (Marilyn Fontaine, Aboriginal Women's Unity Coalition), and warned of "the irrationality behind defining the level of status a person has by your gender" (Linda Ross, Kingsclear Indian Band). Women raised the experience and the fear of political persecution:

> "The response of the Assembly of Manitoba Chiefs to some of the issues that we have raised ... has brought to the foreground the poitential for the abuse of human rights in the existing political and service delivery structures of Aboriginal government. It highlighted the lack of democratic mechanisms that would allow for the full and equal participation of women and off-reserve people in decisions and concern and affect them." (Marilyn Fontaine, Aboriginal Women's Unity Coalition).

Additionally, "there is a real need for the entrenchment of women's rights within self-government" (Sarah Kelleher, NWT Family Services); (Women's) initiatives ... are found to be intimidating and threatening to the male-dominated organisations that claim to represent

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1993, at 45. Hereafter Reconciling the Solitudes.

[26] See Leslie Green, "Internal Minorities and Their Rights", Group Rights (Judith Baker, ed.), University of Toronto Press, 1994, at 113.

[27] Avigail Eisenberg. "The Politics of Individual and Group Difference in Canadian Jurisprudence", Canadian Journal of Political Science XXVII:1, March 1994, at 11.

us. ... They are in the process of negotiating self-governance while they actively try to exclude their female counterparts." (Melanie Omeniho, Women of the Metis Nation).[28]

The case for the universal requirement for institutional protection of fundamental human rights is made by the experience of women who have been subjected to discrimination in or exit from their communities. The case of women further demonstrates the importance of critiquing tradition, and of resisting the exaltation of tradition, because it is precisely in traditions and in social and religious practices that oppressive relations exist. Removed from critique, or exalted, they cannot be tested against normative values of justice and ethics. Presentations to the Royal Commission on Aboriginal Peoples by some intervenors warned against fundamentalist traditions which can be oppressive, especially to women. The RCAP noted the concern of many Aboriginal women about the potential for marginalisation of women if particular traditions were resurrected which placed women in "advisory and supportive roles" and restricted their active and direct participation.[29] Nor is the language of rights inherently alien to aboriginal cultures or governments, nor should it be. As Charles Taylor has noted, "Rights talk is plainly part of modern emancipated humanism."[30] It is because of our human-ness, not our ethnic identity, that we are equally worthy of a certain standard of treatment and respect.[31]

Examining Tradition

How does tradition fit with contested gendered power relations? Tradition is by definition determined by relations of dominance, in favour of the dominant. Marilyn Friedman's critical examination of tradition and of gender oppression demonstrates the need to protect individuals within communities, and to require mechanisms through which governments can be called to account for violation of fundamental human rights.[32] What Friedman calls "communitarian philosophy"[33] and others call collectivism "invoke(s) a model of community which is focused particularly on families, neighbourhoods, and nations", models which are the precise sites of gender oppression contested by feminist analyses.[34] Friedman suggests two problems that are created by communitarian essentialism and that are central to the theoretical and political problems facing aboriginal feminism: the failure to accept that many traditional social communities "make illegitimate moral claims on their members, linked to hierarchies of domination and subordination" and the reality that these communities present "troubling paradigms of social relationship and communal life".[35] Friedman goes on to argue that many of these communities practice exclusion and oppression, especially on the bases of ethnicity, gender and sexual orientation. Insofar as we live in an increasingly heterogenous and interconnected world with obligations and claims crossing specific community boundaries, then, community of interest and or origin are not sufficient to "determine the legitimate moral values or requirements which rightfully constitute the self's moral commitments or self-definition".[36]

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[28] Royal Commission on Aboriginal Peoples, Perspectives and Realities, Vol.4, Supply and Services Canada, 1996, at 73-80.

[29] Ibid at 137.

[30] Charles Taylor, Reconciling the Solitudes at 47.

[31] Steven C. Rockefeller, in Charles Taylor, Reconciling the Solitudes, at 88.

Friedman calls for a "theory of communities, of their interrelationships, of the structures of power, dominance, and oppression within and among them" to serve as a tool of moral critique and measurement and to sidestep the essentialist arguments of the invokers of 'tradition'.[37] Friedman takes the unapologetically feminist view that the elimination of institutional and structural bases of gender oppression is a just and legitimate objective.[38] And she warns, "Some of us are constituted as deviants and resisters by our communities of origin, and our defiance may well run to the foundational social norms which ground the most basic social roles and relationships upon which those communities rest."[39] Following Friedman, this chapter is guided by the feminist slogan that 'the personal is political', based on the assertion that the primary sites of women's oppression are located in precisely those social institutions where privacy conceals and tradition exonerates practices which oppress women. Tradition is always subject to interrogation.

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[32] Marilyn Friedman, "Feminism and Modern Friendship: Dislocating the Community", Feminism and Political Theory (Cass Sunstein, ed.), University of Chicago Press, 1982. Hereafter "Feminism and Modern Friendship".

[33] Ibid.

[34] Ibid at 145.

[35] Ibid at 147.

[36] Ibid at 149.

[37] Ibid at 150.

'Tradition' is a contextual and contested term, dependent on temporal location and contested by those who are part of the social and political landscape of which tradition is a permanent yet changing feature. Aboriginal cultural identity is not a single element, according to the Royal Commission on Aboriginal Peoples, but rather is a "state of being that involves being wanted, being comfortable, being a part of something bigger than oneself".[40] Custom must be treated as relational rather than fixed. Once captured as an unchanging and definitive feature, tradition is ossified: it is dead.[41] Much of the contemporary contestation over aboriginal traditions is fraught with disputes about whose version is authoritative or authentic and which power relations and relations of subordination it consolidates. There is no consensus on the historic point before which practices can be characterised as untainted tradition and after which they are syncretic with colonial influence, and whether that kind of cultural change is as valid as the pre-colonial kind. The plurality of views on the content and authority of tradition makes it difficult to rationalise privileging any particular view and ultimately the reason to do so may be strategic.[42] While the full or partial replacement of traditional political practices and institutions with those imposed by the Indian Act is being challenged by those who call for a return to the principles and practices of indigenous traditions,[43] the Royal Commission on Aboriginal Peoples notes that traditions can and should be adaptable and contemporary, and warns that "(i)t is not the heedless reproduction of outmoded practices that makes a vigorous tradition, but a strong connection with the living past."[44]

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[38] Ibid.

[39] Ibid at 158.

[40] Royal Commission on Aboriginal Peoples, Perspectives and Realities, Vol.4, Supply and Services Canada, 1996, at 524.

[41] The Supreme Court of Canada has shown a penchant for defining aboriginal traditions as fixed at a pre-colonial point in time, thereby negating any possibility of authentic aboriginal cultural evolution and of the rights that culture is evidence of. See John Borrows' discussion of this in "The Trickster: Integral to a Distinctive Culture", Constitutional Forum Vol.8, No.2, 1997.

Cultural change and syncretisation is well documented, showing both the viability of aboriginal cultures in meeting change, and in problematising the notion of 'tradition'. Martha Flaherty of Pauktuutit, the Inuit women's organisation, has spoken of the conflicted issue of tradition and culture, and the way in which women who articulate problems and call for change are accused of promoting white (southern, Qallunaat) solutions. However, she argues: "Contemporary Inuit culture reflects our deeply rooted traditions, beliefs and practices as well as our contact with Qallunaat. We cannot blindly cling to the past."[45] And in Sawridge, evidence was given of syncretic change:

> Yet, when one hears today from members of the Horn Society among the Blackfoot that, "Jesus is the Morning Star", and when one further learns that the Morning Star is the being that provided to a legendary woman some of the central procedures of the Sun Dance, then one has reason to suppose that Christianity did not simply displace what had preceeded it. Indeed, it is the case today that one of the main functionaries of the Sun Dance is also a

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[42] Roger McDonnell, "Contextualizing the investigation of customary law in contemporary native communities", Canadian Journal of Criminology, July/October 1992, at 311.

[43] Royal Commission on Aboriginal Peoples, Restructuring the Relationship, Vol.2, Supply and Services Canada, 1996, at 115.

[44] Ibid at 117.

[45] Martha Flaherty, "Inuit Women: Equality and Leadership", Canadian Women Studies Vol.14, No.4, 1994, at 7-8.

> Deacon in the Anglican Church -- which is to say, neither Anglicanism nor the Sun Dance is quite what it used to be or yet what it will become.[46]

Even the meaning of the term 'aboriginal' is contextual and dynamic. The notion of aboriginality was a consequence of the colonial gaze: prior to the arrival of colonial powers and especially of their imposition of authority and seizure of land, there was no need to consider aboriginality at all. Aboriginal location is relational and political. The meaning attached to it has evolved over the past 500 years, and so tradition, culture, or rights against the colonising populations and their governments is always contingent.

Tradition, however, serves dual purposes now. It is a thread of social continuity, of cultural integrity held against the assimilative pressures of the dominant western society. It is also political. It serves to define us as different from them, and to define who is authentically us.[47] It is in this second political use that tradition becomes particularly problematic, for this political use of tradition requires more certainty and less ambiguity than simple social practices which mutate over time. Tradition is used to contest and to consolidate power relations.

Politicising Tradition

Tradition is a politicised claim, invoked to lend authority to particular practices or claims. Particularly in aboriginal communities and as a direct consequence of colonial cultural and political repression, tradition is a site of resistence to the colonial presence. Practiced, it becomes a rejection of colonial assimilative policies and a re-assertion of indigenous survival and challenge to the occupying state. Tradition, then, represents both politicised terrain and one that is removed from internal critique. Those who invoke it do so precisely because of its symbolic as well as its structural power. Those who critique it are vulnerable to charges of undermining the authentic practice of indigenous cultures as well as the cause of indigenous liberation. The historical context of indigenous repression by colonial governments has produced an internal discipline that has the potential to "silence and disempower internal minorities".[48] When the plaintiffs in Sawridge claimed that exclusionary membership codes are representative of tradition, they suggest that cultural authenticity is served by these codes. When they call these practices tradition, they implicitly warn off indigenous and non-indigenous critique. After all, there are few non-indigenous scholars who are unaware of Canada's record in repressing indigenous practices as a means to assimilation. Therefore, tradition is conflated with cultural integrity, and then with international law protecting cultures and domestic constitutional law respecting aboriginal and treaty rights to cultural expression.

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[46] Parallax Ethnographic Research, Ltd., Vol.1: "Intervener Expert Report on Ethnographic Evidence" (Native Council of Canada), at 61. Hereafter Native Council of Canada, Vol.1.

[47] See, for example, Gerald Alfred's discussion of Mohawk use of tradition for political development and resistence to westernisation. Heeding the Voices of our Ancestors, Oxford University Press, Toronto, 1995, at 76-77; 90; 146; and 164-65.

This conflation serves to obscure the normative context of traditional practices: tradition becomes intrinsically good. There are no internal appeals from traditional practices, if these are insulated from critique and from change. In the absence of internal arbitration, individuals turn to Canadian and to international law to contest cultural practices. The case of Thomas v. Norris, in which David Thomas protested his kidnap and assault in the traditional practice of spirit dancing, illustrates this point.[49] The court did not accept the defendants' argument that their traditional practices trumped Thomas's individual rights in this case. In law, then, there are some signals that tradition is not axiomatically an entitlement to behave in ways that violate contemporary norms and rights invoked by some contemporary members of the culture inheriting the traditional practice.

Invoking Tradition in the Twinn Case

In Sawridge the plaintiffs argued that the aboriginal and treaty right to membership practices founded on sex and race discrimination was justified by three traditional institutions or practices, which, as tradition, trumped any human rights claims of excluded persons and any human rights codes of the Canadian state. The plaintiffs' argument invoked the existence of coherent, fixed band entities in "aboriginal times" (that is, pre-colonial times), with formulistic membership criteria and relatively impermeable boundaries, and with an imputed power of band political leaders to control membership, affirmed in treaties and in the Indian Act. All of this, argued the plaintiffs, established and affirmed the traditional practice of "woman follows man". As a traditional practice, it is an essential cultural attribute and a constitutionally protected aboriginal and treaty right, thus immunized from contemporary human rights discourse.

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[48] Leslie Green, "Internal Minorities and Their Rights". Group Rights (Judith Baker, ed.), University of Toronto Press, 1994, at 113.

[49] Thomas v. Norris, [1992] 2 CNLR.

a. Traditional Bands and Traditional Leadership

In the Sawridge case, the plaintiffs argued:

> The evidence of the elders given by way of oral history evidence but dealing with more recent events than aboriginal times indicates that, at the time of treaty, Indian bands and groups decided who their members were, and they understood that, at the very least, they were going to have land set aside for them and for their groups, and, at the least, that this reserve land was such that it was the group who would control it. ...
>
> ... (Treaty) Commissioner Laird represented that Canadian law ensured that reserves could not be taken from Indians, occupied by others, or sold without their consent, and that was the consent of the Indian reserve community.[50]

The plaintiffs' point is that Indians entered treaty as bands, with assurances of band control of reserve lands. They then argue that bands, having control of reserve lands, must have control over who is a band member because the effect of having imposed members is to take reserve lands from the band for the benefit of others.

Much of the plaintiffs' evidence was contested and contradicted by the intervenors. The Native Council of Canada introduced expert evidence arguing that bands in pre-colonial times were fluid, with members joining for indeterminate periods and leaving at will and without prejudice. Kinship ties, personal disputes and preferences, and other factors conditioned the factors that brought and kept people together. They were social, political and kinship units, but were not fixed structural units.

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[50] Mr. Henderson, Court Transcript recorded by David Mackay, C.S.R., R.P.R., Court File No. T-66-86, April 25, 1994, Vol.79.

> With past affiliations and present associations in varying stages of disengagement and integration, there were always an undetermined number of people whose band membership was ambiguous. ... Considerations of kinship and marriage neither defined the boundaries of bands, precisely regulated recruitment or admission to bands, nor systematically articulated relations between bands.[51]

Bands, argued the Native Council of Canada, were "an atomized social form in which individual people emerge as the principle units of organisation";[52] they were fluid but bands were not simply chance groups. Indeed, even legal precedent acknowledges the difference between pre-Indian Act and contemporary bands: "there are three forms of bands, the traditional band, the trading-post band, and the government or registered band".[53]

There are countless instances of people moving between bands and even between nations. Perhaps one of the most famous is the adoption of the famous Cree Poundmaker by the Blackfoot Crowfoot. Poundmaker's origins are disputed, though the prominent politician and leader occupied a role in both Blackfoot and Cree society. Ben Calf Robe recounts a story about Poundmaker, in which his birth is the result of his father's taking of a Cree captive as "an extra wife" (or is this just ordinary warfare rape?). The woman, pregnant, was returned to the Crees under a negotiated exchange. Poundmaker and Crowfoot met as adults and Crowfoot acknowledged Poundmaker as his son.[54] Hugh Dempsey, however, invokes the more common understanding of Poundmaker as an adopted son of Crowfoot.[55] Crowfoot himself was born in the Blood tribe; he married into the

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[51] Native Council of Canada, Volumn 1 at page 35.

[52] Ibid.

[53] Attorney General for Ontario v. Bear Island Foundation et al.*, cited in Defendant's Memorandum at 39.

[54] Ben Calf Robe, Siksika: A Blackfoot Legacy (with Adolf and Beverly Hungry Wolf), Vol.16 of the Good Medicine Series, Invermere, B.C., Good Medicine Books, at 22.

[55] Hugh Dempsey, Crowfoot, Chief of the Blackfeet, Hurtig Publishers, Edmonton, 1972, at 25.

Blackfoot tribe and made his personal and political home there.[56] These two very prominent examples, then, show how band membership was not fixed, and even distinctions between culturally distinct and politically hostile nations could be bridged.

Bands' fluidity and leadership selection among the Blackfoot is demonstrated by Dempsey's account of the dynamics involved in a leadership contestation in a member band of the Blackfoot tribe. Some members preferred Crowfoot and some Three Suns junior; over a period of weeks opinion consolidated, and then the band split, "with about twenty-seven lodges going with Three Suns and twenty-one with Crowfoot".[57] Three Suns' band retained the name "the Biters" and Crowfoot's band became known as the Big Pipes.[58] This challenges the notion of rigid band membership based on patrilineal, culturally defined or racial descent criteria.

The Sawridge band is not itself the entity that signed Treaty No.8. Keenooshayoo, together with a number of his associates ("headmen", in the vernacular used by the Crown) signed as a single band. After his death there was evidently some social and political crisis, and thereafter the Canadian government dealt with five sub-groups of the original band as separate bands, each with an appointed chief and having separate locations.[59] Sawridge is one of the five.

The evidence on the socio-political formation of bands in the early years of colonisation demonstrates practices of self-identification for inclusion and of continuous evolution in terms of composition of individual bands, and of the numbers of bands. Again, evidence shows tradition to be contextual and contested rather than immutable and sacrosanct.

The structures and processes of leadership selection have changed as a consequence of the band structure imposed by the Indian Act and by the treaty commissioners as a condition of entering treaty, as discussed in Chapter One. The historically varied processes of different indigenous nations demonstrate both national distinctiveness and the homogenising formula imposed by the *Indian Act*. Because *Sawridge* proposes historical recognition of bands by the Canadian state, it is necessary to consider leadership, for the treaties were signed by chiefs who were sometimes designated by the treaty commissioner. This history fundamentally challenges the premises of *Sawridge*, that the treaties and then the *Indian Act* were confirmatory of Indian traditions rather than of British and Canadian ones.

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[56] Ibid at 46.

[57] Ibid at 47.

[58] Ibid.

[59] Defendant's Memorandum, at 59-60.

For example, traditionally, leadership for the James Bay Cree was based on notions of personal achievement and personality -- on competence, sociability, wisdom, judgement, and so on; it was "a product of public recognition or of followership" which was also contextual and fluid.[60] Traditional band leaders "are simply those who, in a variety of ways...have earned repect and, thus, followers."[61] Dempsey's account of Blackfoot treaty-making indicates that there were several chiefs, some of whom were prominent and others who were less so.[62]

This form of leadership recruitment and maintenance is dramatically different from the chief and headmen model required by the treaty commissioners as a condition of entering into treaty. Rather than engaging with indigenous political practices and leadership designations, colonial authorities evangelising for the Treaties and the *Indian Act* "interrupted the rhythms and flexibility of such organization in favour of static distinctions and exclusionary considerations."[63] Treaties did not define 'band'[64]. Those lionized by history as chiefs are those who were recognised by the historians, most of whom rely/relied on colonial accounts for their information. It is indicative that Hugh Dempsey, for example, writes of the Blackfoot tribe's leaders during the mid-1800s, that the "best leaders" had "contributed much to maintaining friendly relations with the traders".[65] This evaluation shows how indigenous leaders were rated, promoted, and how their contributions were recorded, depending on their utility to colonising power.

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[60] Ibid at 43.

[61] Native Council of Canada, Volumn 1.

[62] Hugh Dempsey, *Crowfoot, Chief of the Blackfeet*, Hurtig Publishers, Edmonton, 1972, at 28.

[63] Native Council of Canada, Executive Summary, Volume 1.

[64] Defendant's Memorandum, at 64-68.

Contemporary bands are legislatively constituted by the Indian Act for the purposes of the Government of Canada, and historically for entrance into treaty by the occasion of a 'party' of 'Indians' being identified by the colonial power, along with their 'leaders', for purposes defined by the colonial power. Indeed, Alexander von Gernet notes that the colonial government was not interested in "preserving the integrity of socioterritorial groups", that is, of existing bands and alliances of bands and individuals, but rather in having identifiable leaders, who had more personal authority after than before treaty.[66]

Treaties were made between the representatives of the Crown and the 'inhabitants' of the treaty area, according to the wording of the the written documents. The Crown's negotiators had little regard for aboriginal national integrity, inclusivity, or compatibility, being concerned instead to secure title in identified areas. Indeed, the Crown viewed, and intended to treat, aboriginal peoples as racially homogeneous. Parliament manifested this through the Indian Acts, a 'one size fits all' status Indian policy. The Crown in Sawridge suggested that the treaty-making process actually fostered pan-Indian identity and weakened aboriginal national identity.[67]

The plaintiffs' argument fails, because its contention that the colonial Crown which signed treaties and passed the Indian Act did so in a way which demonstrated recognition of and respect for traditional socio-political formations and practices. It also fails to establish those formations and practices as a matter of evidence, and so must fail in its

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[illegible] Hugh Dempsey, Crowfoot, Chief of the Blackfeet, Hurtig Publishers, Edmonton, 1972, at 45.

[66] Native Council of Canada, Volumn 1, Dr. Alexander von Gurnet at pages 16-18.

[67] Defendant's Memorandum at 102.

submission that authentic cultural practices emanate from these formations and practices, as well as that authentic cultural practices now derive from them.

b. "Woman Follows Man"

In Sawridge, the plaintiffs argued that the membership limitations of the Indian Acts were in fact statutory recognition of a cultural practice in use since time immemorial. "(T)he evidence is clear that women followed the men in aboriginal times".[68] But even testimony by the plaintiffs' witness George Ermineskin, of the Ermineskin band, shows that this rule is dependent on the notion of legal, that is, state- and church-sanctioned marriage, and not on cohabitation or traditional marriage. Ermineskin's daughter lives with a man from the Samson band; he considers them married; he also still considers her a bona fide Ermineskin band member.[69] And Muldoon J. noted the contradictory and incredible testimony of Wayne Roan, representing the Sarcee band in the suit. Roan argued that it was traditional for the woman to follow the man; yet, he had no convincing explanation of why his own father had switched band membership to his wife's.[70]

The expert witness for Twinn et al., Dr. John Moore, was discredited in cross-examination. Indeed, even Moore's problematic research did not support the plaintiffs' allegation about the custom of "woman follows man".[71] Further, the Crown contested the plaintiffs' evidence supporting a customary aboriginal practice of "woman follows man". The plaintiffs argued that "with respect to the practise and the custom of woman following man which my friends dispute, I say the evidence that has been referred to does go to aboriginal times, my Lord, not just post treaty times".[72] The argument, then, became about the authority, veracity, historical location and significance of the traditions under discussion.

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[68] Ibid.

[69] Testimony of George Ermineskin, replicated in Sawridge at paragraph 111.

[70] Sawridge at paragraphs 106-107.

[71] Defendant's Memorandum, at 49.

[72] Court transcript, recorded by David Mackay, C.S.R., R.P.R. Mr. Henderson's submission, April 22, 1994, Volume 78.

The Crown's expert, Dr. von Gernet, whose job it was to critically examine Moore's findings, suffered insignificant damage in cross-examination. Von Gernet's findings are summarised as follows in the Crown's pleadings:

> 1. There were no 'laws' reflecting a patrilineal, patrilocal system and there were no abstract constraints on 'membership' based on kinship and marriage.
>
> 2. Social organization was not rigid but flexible and adaptive, resulting in fluidity in the size and composition of groups.
>
> 3. There was no adjudicating authority (individual or collective) charged with decision making powers with respect to group membership.
>
> 5. a) Any individual, irrespective of ethnicity, gender, affinity or consanguinity could join or leave a group after he/she had assessed the benefits the group leader could provide.
>
> b)i) Membership in groups was thus determined essentially more by a process described as 'self-inclusion' rather than by a process of exclusion and elimination through veto cast by the band members.
>
> ii) This reflected native principles of generosity.
>
> 6. Native women who married European men retained 'membership' in their natal groups.[73] (emphasis mine)

The genealogical study of some of the Sawridge people shows the fluidity of membership, and shows men from other bands acquiring membership by marriage to women from the two bands.[74] Nor was this anomalous: among the Blackfoot, the woman generally moved to the residence of her husband upon marriage.[75] However, it was not an immutable rule, with Crowfoot, born a Blood and then marrying into the Siksika and making his home there, being the most prominent example.

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[73] Defendant's Memorandum, at 54-56.

[74] Sean Kennedy, "Report on Sample Genealogies from Kinosayoo's Band at Swan Lake and Sawridge", Appendix A, at pages 2-6. Native Council of Canada. (Parallax Ethnographic Research, Ltd.), Volumn 1: Intervener Expert Report on Ethnographic Evidence, in Twinn et. al v. Canada et. al (Federal Court - Trial; Muldoon J., 1995).

c. Politicisation of Tradition in the Twinn Case

The evidence about social and political practices related to national and band formation in the period of early colonisation, social practices then and now, and the policy objectives of the Indian Act suggests that 'traditional' practices have both been influenced by colonial practices and by political and economic considerations in contemporary times. Moreover, social and political practices appear to have been rather more fluid then than they are now, and have little functional correspondance to the contentions of the plaintiffs in Sawridge about formulaic, inalterable practices essential for cultural survival and integral to rights.

Indeed, in Sawridge, the court was not convinced that the plaintiffs acted out of a sincere belief in the practice of exclusionary band membership codes as a culturally important tradition. Rather, invoking tradition seemed to be instrumental as a means of protecting other interests. The Crown painted Sawridge as a nepotistic oligarchy: "(t)hree members of the Twinn family have total control of all of the band's power levers and resources"; and there has been no effort to protect or promote aboriginal culture or a sense of community.[76] The Sawridge band council, all members of the Twinn family, have used their legislative power to foreclose reserve residency for off-reserve band members.[77] Those who are not members of the Twinn family must contend with the threat of losing their band membership, the benefit of band fund expenditures, the benefits of government funding of the band, specific programs, and "material benefits of band membership except when they are prepared to sell their membership rights at fire sale prices".[78] That is, non-Twinn family band members are encouraged to sell their membership rather than to be a meaningful part of community life. The Crown argued that the Sawridge band's scheme of trusts was designed to prevent reinstated band members from benefiting from the trusts.[79] The Court appeared to accept the Crown's argument, and added to this the proposition that the 'blood quantum' requirement in the plaintiffs' membership codes "is a highly fascist and racist notion".[80] In its report published a year later, the Royal Commission on Aboriginal Peoples seemed to agree.

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[75] Hugh Dempsey, Crowfoot, Chief of the Blackfeet, Hurtig Publishers, Edmonton, 1972, at 423.

[76] Defendant's Memorandum, at 122-123.

[77] Ibid at 123.

> Aboriginal peoples are not racial groups, rather they are organic political and cultural entitites. Although contemporary Aboriginal groups stem historically from the original peoples of North America, they often have mixed genetic heritages and include individuals of varied ancestry. As organic political entities, they have the capacity to evolve over time and change in their internal composition.[81]

The Ermineskin Band, the Crown argued, was not homogeneous in terms of religious, political, or traditional ideology. The Sarcee Band demonstrated extensive community cleavages, especially on the matter of the membership code.[82] There is evidence of deep divisions between 'insiders' and 'outsiders' in the Sawridge band. Clearly, then, there is no consensus on the validity of the existing membership codes as traditional practices, or as normatively defensible. Further, there is ample evidence that the internal minorities are vulnerable to silencing, delegitimation, and ultimately, to involuntary exit from the very entity they have a right to live in community with.[83]

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[78] Ibid at 123-124.

[79] Defendant's Memorandum, at 94.

[80] Sawridge, at para.165.

[81] Royal Commission on Aboriginal Peoples, Restructuring the Relationship, Vol.2, Supply and Services Canada, 1996, at 177.

[82] Ibid at 125-126.

Distinguishing Rights

Aboriginal rights are not minority rights, although aboriginal people form a minority within settler states. Minority rights are located in relation to majority interests; that is, they are a defence against the unthinking oppression of a majority. But they are not located as a challenge to the state, and they are not formed from historical relations producing that challenge. Aboriginal rights are distinctive in this way.

Because of this important distinction, it is problematic to use the lens of liberalism to view the possibilities and problems of aboriginal self-government. Liberalism's minority rights paradigm misses the essential quality of aboriginality, by locating the claim in relation to the colonial and now settler state. Aboriginal rights pre-exist the state and are now invoked against the sovereignty of the state. Minority rights exist within the state. While both aboriginal and minority populations share some experience of marginalisation, the political meaning attributed to these experiences is quite dissimilar.

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[83] For example, Elizabeth Courtoreille, a seventy-year old woman, is suing Walter Twinn and the Sawridge band for their failure to reinstate her to the band list and to fulfill alleged financial obligations due her because of treaty and status related rights. Kathleen Steinhauer-Anderson, a woman of about sixty-five years, is suing the federal government for reinstatement to the Saddle Lake band of herself, her children, and her grandchildren. Section 27 of the International Covenant on Civil and Political Rights proclaims the right of individuals "in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language", which has, in the case of Sandra Lovelace v. Canada, (Re Sandra Lovelace, U.N. Human Rights Commission 6-50 M 215-51 CANA) taken to be a right of individuals to be part of their community of origin.

Most discussions of the rights of internal minorities[84] are caught by the paradigm of minority group rights and the rights of individuals in those groups. While they offer useful analyses, they are limited by their failure to take into account the origin and nature of aboriginal rights claims as distinguished from minority rights claims. Here, I explore Will Kymlicka's argument.

Kymlicka argues that community rights in Canada are characterised by "the political recognition of ethnicity or nationality" and by a general acknowledgement of their legitimacy by virtue of their "cultural identity or membership".[85] Community rights are, however, subject to two conflicting views of what they are. The first, which Kymlicka calls "group rights", conceptualised community rights existing independently of the individuals who form the community, and so potentially conflicting with the rights of individuals qua individuals. The second, which he calls "special rights", conceptualises community rights in relation to individuals as members of an identified community, rather than being part of the package of universal human rights.[86] The polarities thus constructed are collective versus individual, or particular versus universal.

"The first kind is intended to protect the community from destabilizing internal dissent, and the second, from external pressures" writes Kymlicka.[87] But constructing community rights to prevent internal dissent raises the possibility of the oppression of individuals within a community, and constructing community rights as attached to an identifiable collectivity raises the prospect of inequality between communities, where some "may be marginalized or segregated in the name of preserving another group's distinctiveness".[88]

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[84] See, for example, Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights, Clarendon Press, Oxford, 1995; Leslie Green, "Internal Minorities and Their Rights", Group Rights, (Judith Baker, ed.)University of Toronto Press, 1994; Charles Taylor, Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism (Guy Laforest, ed.), McGill-Queen's University Press, Montreal & Kingston, 1993; Charles Taylor, Multiculturalism and "The Politics of Recognition" (Amy Gutman, ed.), Princeton University Press, Princeton, New Jersey, USA, 1992.

[85] Will Kymlicka, "Individual and Community Rights", Group Rights (Judith Baker, ed.), University of Toronto Press, 1994, at 18.

[86] Ibid.

[87] Ibid at 19.

Canada has both forms of collective rights: Quebec, indigenous, and ethno-cultural communities are recognised as holding rights against the assimilating pressures of the dominant anglo society; and an emerging set of group rights, notably in relation to Quebec and some indigenous nations, require exemption from the Charter's guarantees of individual rights. In relation to the latter, we see the oppression of "internal minorities" become an issue.

> (W)hile the potential for group rights exists in Canada, there is little public support for the exercise of such rights even in minority communities. Instead, most community rights are defended in terms of, and take the form of, special rights against the larger community. Insofar as potential group rights are present in Canada, they are often defended as unavoidable by-products of special rights, rather than as desirable in and of themselves.[89]

If, as Kymlicka argues, proponents of collective rights "deny that a community's interests are reducible to the interests of the members who oppose it"[90] the debate becomes structured around which set of rights is paramount to the other, and whether the individual as an individual has claims against the group. This dualistic construction of individual versus community does nothing to further understanding of contextuality and of oppression. After all, it is in the context of collectivities -- the family, the nation, and so on -- that individuals and minorities are oppressed by those invoking the normative status quo -- the consensus position of the collectivity.

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[88] Ibid.

[89] Ibid at 21.

[90] Ibid. at 22.

Kymlicka suggests that "most claims for community rights in Canada are asymmetrical"; that is, all communities of interest and identity do not claim nor enjoy identical packages of rights. This raises the question of "whether it is acceptable to accord rights to some people on the basis of their cultural membership, rather than to all people universally".[91]

These rights are granted on the basis of two sets of historical circumstances: the first, the reality of colonial oppression of indigenous nations has in Canada translated into partial colonial acknowledgement of this in the form of pre-existing rights which persist despite the hegemony of the colonial state. The colonial law, then, sustains vestigial indigenous rights -- those rights which would have existed unimpaired but for the colonial fact. This is not a communitarian argument, arising from some decision that the rights of the community persist despite or because of the rights of individuals, but rather is a rights argument arising from colonial history.

Collective, group, or minority rights can be construed so as to affirm a right of the group to limit the individual human rights of its members in the interest of "group solidarity or cultural purity" -- what Kymlicka calls internal restrictions -- or it may refer to the right of the group to constrain political or economic activities of the larger entity that undermine the integrity and viability of the group -- external protections.[92] Kymlicka further distinguishes equality-based arguments, premised on amelioration of an "unfair disadvantage which can be rectified by a group-differentiated right" and history-based arguments, which claim an historical group right "based on prior sovereignty, treaties, or some other historical agreement or precedent".[93]

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[91] Ibid at 23. See, also, Menno Boldt, who takes up the moral basis of aboriginal rights claims and concludes that, if its foundation is rooted in "biological ancestry and first habitation ... it is doubtful that a moral justification exists". Surviving as Indians at 27.

[92] Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights, Clarendon Press, Oxford, 1995, at 7.

Collective and Individual Rights

The distinction between collective and individual rights has typically been conceptualised as an incompatible dualism: the protection of one suggests the subordination of the other. This dualism has been used with regard to aboriginal rights. The argument is framed in this fashion: aboriginal rights are collective rights, and the protection of individual rights, such as those guaranteed by the Charter, necessarily subordinate the rights of the group to those of individual members of the group, and generally, to individual members who identify more with the dominant individualist society than with a specific aboriginal nation. This is a misleading formulation for several reasons. Perhaps the most important one concerns the ability of groups to abuse members (or outsiders), and this is a well-founded worry.[94] Rights of individuals as members of the group -- whether state or subordinate nation -- are buttresses against the most excessive forms of abuse, though they do not erode all intra-group relations of dominance.

Second, a majority of rights which are enjoyed by individuals can only be enjoyed in the context of the group: the community, the society, the nation, or the state. Third, group rights are best conceptualised in relation to other groups; that is, to resist subordination or annihilation through the agency of another group. They are not conceptualised to defend society against its members, though society is always understood to be the necessary precondition for the flourishing of its members. Denise Reaume suggests that "(t)here is an emerging consensus that if there are any group rights, they are rights with respect to the protection of collective interests. ... individual rights concern protection of individual interests."[95] The first can only be enjoyed communally, while the second can only be enjoyed autonomously by an individual. However, Reaume adds that "there can be no individual right to a collective good but only a collective right, held jointly by all who share in the collective good."[96] The question raised but not answered by the Sawridge case concerns who is a member of the collectivity for the purpose of sharing in the collective good. Answering it involves negotiating the matter of involuntary exit of individuals from their community, and the contested question of the rights of individuals to access to their community -- fundamentally, to their identity -- and the right of communities to boundary maintenance. These questions require more rigorous and noble consideration of the rights involved, the interests served and sacrificed, and the normative moral frameworks guiding the negotiation, than is ever approached in Sawridge.

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[93] Ibid at 8.

[94] Denise Reaume, "The Group Right to Linguistic Security: Whose Right, What Duties?" Group Rights (Judith Baker, ed.), University of Toronto Press, 1994, at 118. Hereafter "The Group Right to Linguistic Security".

Are the rights guaranteed to groups (collectivities) to guarantee cultural integrity and vitality, of the same nature as human rights -- that is, are they fundamentally human rights? And how do we account for human rights which apply differentially to groups of people, together with those that apply universally? What kinds of principles determine which categories of rights are universal, and which, in cases of conflict, will be paramount? James Graff seems to suggest that classical liberalism cannot accommodate self-determination of ethnocultural collectivities, because "(i)f one believes that the moral rights of collectivities must be justified by appealing to the rights of individuals and to what their well-being requires, one will, I believe, have to reject the claim that each ethnoculturally defined people has a right to self-determination."[97] This suggests that there are choices to be made and priorities that must be maintained. Therefore either the principle of self-determination is constrained in its application, or the rights of individuals are compromised to privilege the group's right of self-determination. If we take the view that it is as human beings that we are significant, rather than as culturally or descent-based groups, then to the extent that self-determination is expressed at the non-consensual expense of individuals within the self-determining body, collective rights should not erode the fundamental rights of the individual.

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[95] Ibid at 119.

[96] Ibid at 120-121.

Rights theory is most often associated with western liberal democratic capitalist polities, and sometimes is rejected by other states and nations because of this association with western philosophical premises. It has become fashionable for those rejecting western imperialism in its various forms to reject also authoritative rights codes, as part of that same imperialism. For example, "Asian values" have been distinguished by some regimes as antithetical to western individual rights. Interestingly, the invocation of Asian values, African values or of indigenous values is often initiated by domestic citizens who are active in seeking the same rights and freedoms rejected by their governments in the name of cultural authenticity. Similarly, the Assembly of First Nations has rejected the application of the Charter equality rights guarantees as "alien cultural values" and a continuation of colonial oppression.[98]

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[97] James Graff, "Human Rights, Peoples, and the Right to Self-determination", at 187.

David Little has noted the historic compatibility between violations of individual rights in the name of culture, race or state, and the rise of fascism. He argues: "The historical setting of human rights language, then, gives reason for deep and legitimate apprehension in face of assertions about the superiority of collective ends and identity above the physical and moral integrity of the individual."[99] Little goes on to suggest that if non-discrimination is a foundational principle of human rights, then human rights must be universal, undistinguished by race, religion, and so on.[100] Where governments pursue collective objectives that violate individual human rights, Little argues they bear the burden of justification, and that governments committed to human rights must accept the principle of international supervision and of authoritative international determination of questions of state violation.[101]

Charter Imperialism?

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[98] Sally Weaver, "First Nations Women and Government Policy, 1970-92: Discrimination and Conflict", Changing Patterns: Women in Canada (2nd) (Sandra Burt, Lorraine Code, and Lindsay Dorney, eds.), McClelland and Stewart, Inc., Toronto, 1993, at 93.

[99] David Little, "Human Rights: East and West", Behind the Headlines, Vol.53, Nos. 2&3, 1996, at 16.

[100] Ibid at 17.

[101] Ibid.

The Charter of Rights and Freedoms is indebted to international law for much of its ideology and content[102]. Are indigenous governments bound to adhere to the same code of conduct – the Charter – that the constitution demands of provincial and federal governments with respect to Canadians? Some, notably the Assembly of First Nations, have argued that the Charter is so thoroughly a product of western European liberalism that it is a form of colonialism to require its application to indigenous governments.[103] If so, logically international law is equally tainted. However, the Royal Commission on Aboriginal Peoples takes the position that the Charter applies to aboriginal governments, but must be interpreted 'flexibly' to take account of philosophical, traditional and cultural practices.[104] The RCAP suggests that aboriginal women and men are guaranteed equal access to the inherent right of self-government,[105] though what that means is anyone's guess, given that the right cannot be claimed individually. The RCAP thinks that citizenship is part of the inherent right, subject to prohibition of sex discrimination and blood quantum criteria.[106] How will this affect membership codes? According to the RCAP,

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[102] Anne F. Bayesfsky, International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation, Butterworth's Canada Ltd., Vancouver and Toronto, 1992, at 34. Hereafter International Human Rights Law.

[103] During the Charlottetown Accord negotiations and the preliminary four constitutional conferences convened by the Government of Canada, the AFN, as articulated by National Chief Ovide Mercredi and advisor Mary Ellen Turpel, took the position that the Charter ought not to apply to First Nation governments.

[104] Royal Commission on Aboriginal Peoples, Restructuring the Relationship, Vol.2, Supply and Services Canada, 1996, at 168.

[105] Ibid.

[106] Ibid.

> Under section 35 of the Constitution Act, 1982, an Aboriginal nation has the right to determine which individuals belong to the nation. However, this right is subject to two limitations. First, it cannot be exercised in a manner that is discriminatory toward women or men. Second, it cannot specify a minimum 'blood quantum' as a general prerequisite for citizenship. Modern Aboriginal nations, like other nations in the world today, represent a mixture of genetic heritages. Their identity lies in their collective life, their history, ancestry, culture, values, traditions and ties to the land, rather than in their race.[107]

To what standard may indigenous nations be held to account in their construction of the conditions of membership or citizenship? Given the rejection of the Charter as the normative rights standard to be imposed on indigenous nations, it may be more useful to turn to the international standards that also imbue the Charter. Then, both the Charter and indigenous nations will be held to the external standard, a standard which will be essentially the same for each, while allowing indigenous nations to reject yet another imposition of the colonising state. Maxwell Cohen writes:

> The conceptual content and individual governing phrases of the Canadian Charter of Rights and Freedoms have often been derived from the international legal system, its principles and instruments. The very fact, therefore, that this supremely authoritative Canadian document is inextricably linked by language and ideology to important international instruments and principles to which Canada subscribes, assures the inevitability of some resort to these 'external' international legal documents and ideas in order to be certain that on appropriate occasions the 'proper' meaning is given to the Charter and its language.[108]

Under the 'adoption theory', international law is deemed to be incorporated into domestic law "without an act of incorporation, except where it conflicts with statutory law, or well-established rules of the common law".[109] Canadian case law indicates that the theory regarding adoption of international law is accepted in Canada[110] and further, that Canadian courts can and should consider "international standards which are of assistance in interpreting and applying domestic law".[111] Marilyn Waring argues that "(s)tates are legally accountable for breaches of international instruments that are attributable or imputable to them".[112] Canada, then, has incorporated a host of international laws into both the common law and constitutionally via the Charter, and is responsible for ensuring domestic compliance with this law.

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[107] Ibid.

[108] Maxwell Cohen, "Forword", in Anne F. Bayesfsky, International Human Rights Law, at viii-ix.

The Canadian Charter is framed by documents including the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention Concerning the Freedom of Association and Protection of the Right to Organise, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women.[113] Above all, the Charter's genesis may be found in the Universal Declaration of Human Rights. The Universal Declaration is the benchmark for state behaviour in relation to its citizens. It defines itself as "a common standard of achievement for all peoples and all nations" whose observance is urged on member states and "among the peoples of territories under their jurisdiction".[114] The Universal Declaration, then, is considered to be supremely authoritative in defining standards of behaviour of states and minimum rights of "all human beings".[115] Is the Universal Declaration applicable to indigenous nations? Arguably, it is. While not a creation of indigenous nations, the Declaration and other sources of international law protecting peoples are invoked by indigenous activists against offending state behaviour. It seems illogical to suggest that these standards may serve as a shield against state behaviour but not as normative standards for indigenous nations. Further, international law is both imbued with the power relations of imperialism's children and with the decolonising impulse resisting (and controlling) that fact. As such, it contains power to name and resist colonial consquences. It is also the only universal code of rights framed to resist the oppressive potentials of political formations. Excepting indigenous governments from its application, and arguably, from the application of the Canadian Charter, leaves the question of power relations within these governments apart from review, from critique, and from any relatively neutral standard of accountability. It abandons the rights of indigenous persons subject to those governments to trust, tradition, and power relations, and separates them from the processes that defend the rights of everyone else in the world.

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[109] Ibid at 5.

[110] Anne F. Bayesfsky, International Human Rights Law, at 17.

[111] Ibid at 20.

[112] Marilyn Waring, Three Masquerades: Essays on Equality, Work and Human Rights, University of Toronto Press, Toronto, 1997, at 119.

[113] Bayefsky, International Human Rights Law at 34.

Indigenous contribution to international law has been increasing with the advent of indigenous non-governmental organisations in the 1970s, and their participation within the United Nations structure, and with especially the Working Group on Indigenous Peoples, established in 1982. The Working Group, attached to the Sub-committee on the prevention of discrimination and protection of minorities, priorises indigenous peoples' participation rather than states.[116] It's mandate is to (1) review the human rights of indigenous people worldwide, and (2) to contribute to the elaboration of international standards for the human rights of indigenous populations.[117]

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[114] Universal Declaration of Human Rights, Preamble.

[115] Universal Declaration of Human Rights, Article 1.

The indigenous participants of the Working Group organised and drafted the declaration of principles on indigenous peoples' rights, which, through lobbying states, resulted in the Draft Declaration of 1993. The declaration on the rights of Indigenous peoples "expresses the basic sense of emerging international norms relating to Indigenous peoples."[118] The Draft Declaration has been adopted by the Working Group and by the Sub-Committee on the prevention of discrimination and protection of minorities, but has yet to make its way through the remaining layers of the United Nations structure to the General Assembly. The participation of indigenous peoples has raised contestation of the dominant political, economic and philosophical metanarratives which underlie assumptions about international relations.[119]

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[116] The Sub-committee advises the Commission on Human Rights, composed of 52 member states, which in turn reports to ECOSOC, which reports to the General Assembly of the United Nations. Isabelle Schulte-Tenckhoff, "Indigenous Peoples, States, and the Draft Declaration on the Rights of Indigenous Peoples", Presentation, University of Alberta, March 01, 1996. Hereafter "Indigenous Peoples".

[117] Ibid.

[118] Royal Commission on Aboriginal Peoples, Restructuring the Relationship, Vol.2, Supply and Services Canada, 1996, at 168.

[119] Isabelle Schulte Tenckhoff, "Indigenous Peoples".

International law has been criticised for its unobligatory nature, reliant as it is for enforcement on diplomacy and constructed in the arena of fluid strategic alliances. It has also been criticised as another emanation of "the rules of the rulers" in that it is generally those controlling economic and military power who approve, amend, ratify or reject international law. What, then, is the moral scope of its universal applicability?

Despite its particular location described above, international law arguably represents the best impulses of the human community. Despite their structured and exclusionary nature, international fora have been valuable for emerging states and non-governmental organisations representing rights claims and emancipatory impulses. There are fundamental commonalities among peoples. I reject the insinuations of incommensurability that posit such a gulf between colonised and coloniser that no common ground can be found. Commonality includes fundamental rights and freedoms within the universe of cultural cohesion. But within this universe, invocation of cultural icons or 'tradition' will not save abusive practices from scrutiny and criticism when held up to the light of international standards.

This is particularly important for consideration of the dispute about whether the Charter should apply to aboriginal governments in Canada. The arguments against its application include the rejection of this paramount symbol of Canadian sovereignty, and more philosophical critiques of the relevance of a Charter grounded in western liberal political traditions for indigenous cultures. Indeed, the Charter has been criticised for promoting a focus on the individual to the detriment of the collectivity, which, it has been argued, is the central focus of indigenous conceptions of society. It has also been condemned as impairing the traditional sociopolitical practices of first nations by submitting such practices to Charter guarantees.[120] But not all aboriginal nations insist that traditional practices and decolonisation must be uncontaminated by rights discourse. The Inuit, for example, argued before the Royal Commission on Aboriginal Peoples that Canada ought to give "full recognition of the right of indigenous peoples to self-determination, under international human rights standards".[121]

It is interesting to examine these competing rights claims in light of the Platform for Action produced by the 1995 Fourth World Conference on Women (the Beijing Conference), which further strengthens the gender and human rights of girls and women.[122] In the Platform there is state and non-governmental organisation agreement that tradition may not be invoked to undermine the rights of women and girls further to the Charter of the United Nations; the Universal Declaration of Human Rights and other international human rights instruments.[123] Indeed, the Beijing Declaration calls on states party to

> Intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race,

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[120] Twinn v. Canada, FCT (1995); FCA (1996), in which the plaintiffs argue that several sections of the Indian Act 1985, amended to conform with anti-discrimination measures of the Charter, are unconstitutional insofar as they offend section 35, Constitution Act 1982 aboriginal and treaty rights.

[121] Quoted in Royal Commission on Aboriginal Peoples, Restructuring the Relationship, Vol.2, Supply and Services Canada, 1996, at 113.

[122] Preliminary report of the Fourth World Conference on Women, A/CONF.177/20, 9531259 United Nations.

[123] See Annex I, Beijing Declaration, numbers 8, 9 and 32.

age, language, ethnicity, culture, religion, or disability, or because they are indigenous people[124].

The need for some supremely authoritative code constraining government action to limit citizen activism and dissent is apparent in the implied limitations of dissent in the debates sketched above. Those who have suggested that the Charter should apply, and who suggest that indigenous political leaders have been and may continue to stifle dissent, have been subjected to condemnation and other forms of criticism. In particular, indigenous women who wear the feminist label, or who agitate for women's interests, or who suggest that political hegemony is male and is not serving women and children well, find themselves silenced and ridiculed. The ultimate silencing, which I suspect leads to a great deal of self-censorship, lies in the implicit or explicit charge of 'race traitor', the accusation that by identifying with the interests or taking the analyses named in this paragraph, women are betraying the cause of indigenous liberation.[125]

Even exclusive governmental structures and processes must have processes of accountability to enjoy legitimacy, and those who are governed must have processes for criticism. It seems too simplistic to condemn the Charter as a colonial imposition, and invoke incommensurable difference as a defence against rights discourse. After all, incommensurable difference was a weapon in the arsenal of colonialism, part of a constructed instrumental racism that served to provide moral and legal justification for appropriation of land and resources. It seems that the colonised have now seized on this constructed difference as a matter of fact and of virtue, and now invoke it against internal dissenters who do not accept incommensurability, and find in the Charter common values worth preserving.

Difference As An Alternative To Rights

In an effort to move beyond the impasse of rights hierarchies, Avigail Eisenberg has suggested that a "difference perspective" can move debate from the dualistic construction of individual versus collective rights (the "dominant view") posited in constitutional cases contesting or arguing hierarchies of rights.[126] Rather than being concerned with rights, Eisenberg argues for concern with maintenance of the foundational elements of culturally significant difference.[127] "Political culture, processes and historical circumstances all contribute to determining which differences are chosen to receive recognition and protection."[128] Eisenberg thinks that moving from the language of competitive or conflictual rights hierarchies to consideration of individual and group differences "helps to emphasize what a discourse based on rights obscures: that the identities of individuals and groups are threatened by different kinds of circumstances"[129], and that protection of legitimate (that is, fundamental to identity) differences should be the paramount public policy objective. But substituting the goal of protecting difference for rights does not eliminate hierarchies of interests which will have to be arbitrated. If courts are concerned to protect identity rather than ascertain and arbitrate rights, then we are all in a post-modern puddle of identity without priority, without historical location, and without power relations structuring actual lived reality. Identity could be Burns Nicht and the piping of the haggis, it could be Orange Lodge antics, it could be white culture proponents, it could be anything, or nothing at all.

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[124] Ibid, Section 32.

[125] For discussion of this, see, for example, Joyce Green, "Constitutionalising the Patriarchy", Constitutional Forum 4,4, 1992.

The Constitution is not designed to protect group difference. It is designed to (insofar as the Charter and the 1982 amendments go) guarantee fundamental human rights accruing to all human beings and to guarantee civil and political rights to all citizens. It seeks to protect certain communities from discrimination as members of those communities so that the basic entitlements of citizenship are available to all Canadians. It recognises difference qua different location (disabled, race, creed, etc.) not in order to protect difference but to protect peoples from oppression because of difference. Aboriginal rights are of a different category, a pre-existing claim against the Canadian state that accrues in addition to the rights of citizenship, and the right to be free from discrimination. Difference will never account for the political and historical context of this claim.

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[126] Avigail Eisenberg. "The Politics of Individual and Group Difference in Canadian Jurisprudence", Canadian Journal of Political Science XXVII:1, March 1994.

[127] Ibid at 9.

[128] Ibid at page 10, footnote 24.

[129] Ibid at 11.

Nor is the difference approach neutral. Cultural differences have been invoked to deflect a variety of critiques, especially in regards to the status of women. The Beijing Conference witnessed a host of states affirming women's equality provided it did not interfere with traditions which structured women's inequality. For them, the value of these 'differences' is higher than that of women's equality, of women's fundamental human rights. Difference, then, is constructed as inherently valuable.

The Royal Commission on Aboriginal Peoples notes the difference between women's roles in pre-colonial societies and contemporarily, and that there is no consensus even within nations on which is better for women.[130] It noted the traditional sexual division of labour did not necessarily mean lower status, though some intervenors indicated women's status was subordinate, especially in political matters. Some noted the oppressive features of the Indian Act which now are practiced by band governments; some "warned of the dangers of fundamentalist approaches to self-government, which treat sometimes oppressive traditions as sacrosanct and fail to scrutinize them adequately in the light of present-day realities and values".[131] Others suggested a return to pre-colonial traditions would be sufficient for good governance.[132]

On the nobility of tradition marked differences, Elder Hilda Big Crow recalls that prior to colonial contact, the practice of the Tsuu T'ina was to kill male enemies taken in battle, and to either enslave or enwife the enemy women.[133] The practice of several B.C. coast nations, notably the Haida, was to enslave persons captured from other nations. The practice of the Blackfoot was to beat, mutilate, or kill women believed to have committed adultery (with no similar sanction for transgressing men). The Royal Commission on Aboriginal Peoples related the tradition of male dominance and the common practice of female infanticide among the Netsilingmiut Inuit.[134] As Emma LaRocque remarked, "All our traditions are not great and good."[135] These and other examples demonstrate traditional practices that are inarguably manifestations of cultures located at a point in time, with geographical and other referrents which produced sets of practices. But that alone is insufficient to render them venerable or worthy of contemporary reinstatement.

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[130] Royal Commission on Aboriginal Peoples, Restructuring the Relationship, Vol.2, Supply and Services Canada, 1996, at 122-126.

[131] Ibid at 124.

[132] Ibid at 125.

[133] Testimony of Hilda Big Crow replicated in Sawridge at para.122.

Cultural practices are what make cultures distinct, and they are frequently defended as essential for cultural survival. Sometimes they are. Sometimes they are indefensible in the context of contemporary understandings about human dignity. To discuss cultural practices' legitimacy is to tread on deeply held views about social, religious and political meaning for specific societies. As Martha Minow observes, "the common tendency to treat differences as essential, rather than socially constructed, and to treat one's own perspective as truth, rather than as one of many possible points of view". [136] But is everything then relative, and are disputes ultimately equally valid points of view, or are there value judgements about rightness and wrongness that can and should be made? Consider female genital mutilation, the (near-universal) culturally conditioned preferences for boy babies, denial to women of property rights, enforced segregation of women in society and exclusion from paid work, and a host of other common, culturally-embedded and state-sanctioned forms of sex discrimination.

Conclusion

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[134] Royal Commission on Aboriginal Peoples, Restructuring the Relationship, Vol.2, Supply and Services Canada, 1996, at 132.

[135] Emma LaRocque, Keynote Speaker for "Women Who Own Themselves", the final report on the conference on Metis women and governance, held by Women of the Metis Nation, June 11-12, 1993, Edmonton, Alberta.

[136] Martha Minow, "Feminist Reason: Getting It and Losing It" [1988], Feminist Legal Theory: Readings in Law and Gender (Katharine T. Bartlett and Rosanne Kennedy, eds.), Westview Press, Boulder, 1991, at 358.

Contemporary indigenous societies are part of the common trajectory of history that, for better or worse, includes contact with the oppressor and the hybridization of ideas and of peoples. Self-determination in some 'pure', pre-colonial form (the "aboriginal times" invoked by the plaintiffs in Sawridge) is impossible. As Samir Amin warns, we must avoid the "prejudice of cultural immutability ... the idea that cultural differences are not only real and important, but fundamental, permanent, and stable, that is to say transhistorical".[137] In Sawridge, cultural differences are used to legitimate oppression and to deny the possibility of emancipation grounded in equality and justice.

Nor, in international law, is cultural integrity sufficient to permit violation of women's human rights. The language of rights is part of the contemporary human discourse about the relationship between peoples and governments. Indigenous governments are not apart from this discourse. Nor is there any satisfactory evidence that indigeniety per se is dependent on sex discrimination or other forms of human rights abuses for its very existence. Indeed, the language of difference as a precondition for authenticity owes more to colonial racism than to anthropology, theology, sociology or indigenous nationalism.

Tradition is contested and highly politicised terrain. It is simultaneously cultural strength and weakness: strength, in carrying forward the wisdom of generations in cultural practices that are encoded programs for survival, and weakness, in forming practices the invocation of which become axiomatically correct, and which stifle syncretic and evolutionary change. In the context of resistance to external oppression, return to tradition signals both cultural survival and the potential for extreme intolerance of internal minorities. That is, cultural and ethnic celebration contains the potential for fascist practice. It is only through the guarantee of the fundamental human rights of all citizens as human beings that this fascist potential can be contained.

The plaintiffs in Sawridge conflate a highly suspect version of tradition with aboriginal inherent and constitutional rights. They privilege a controversial reading of tradition to protect contemporary political practices of discrimination against women and children from critique, and to argue against the application of human rights standards to the discriminating aboriginal governments. In so doing, they misrepresent their intentions, pretending to be cultural defenders as well as defenders of aboriginal rights, when evidence suggests convincingly that they only intend to maintain barriers to participation in material resources by formerly excluded band members. Alternatively, the evidence suggests that the plaintiffs fundamentally misunderstand history and policy, romanticising a version of both. By implication, they suggest aboriginal governments and social practices are outside the international socio-political community subscribing to universal human rights. Neither cultural or political integrity require oppression as a precondition. Nor is exemption from international rights standards a likely formula for admittance to the community of nations, either within the Canadian federation or globally. The Canadian state is indisputably and rightly accountable for its past policies towards indigenous nations. But that accountability should not produce an axiomatic exoneration by the state of all contemporary practices of bands, especially where they prima facie violate human rights.

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[137] Samir Amin, "Imperialism and Culturalism Complement Each Other", Monthly Review, Vol.48, June 1996, at 4.

Canada cannot avoid its obligation to protect women's human rights. The Convention on the Elimination of Discrimination Against Women (CEDAW) was "adopted by the UN in 1979, ratified by Canada in 1981, which took effect here in 1982".[138] Barbara Roberts writes that

> CEDAW requires signatories to take the necessary steps to eliminate all forms of discrimination against women, not only in law, but in policy, regulation, tradition, practice, custom; not only in public spheres of life, but in private life. CEDAW defines discrimination as any differential treatment that hinders women's exercise and enjoyment of their human rights and fundamental freedoms in all spheres of life.[139]

Clearly, there is an international legal obligation, joined with a domestic constitutional obligation, to protect women as bearers of human rights, as well as women as members of rights-bearing communities, and to privilege rights over tradition in fulfilling these obligations. In international law, cultural integrity is insufficient to permit violation of women's human rights, though it is often invoked by way of apology or explanation.[140]

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[138] Barbara Roberts, "Taking Them at Their Word: Canadian Government's Accountability for Women's Equality", Canadian Woman Studies Vol.16, No.3, 1996, at 26.

[139] Ibid.

The Fourth World Conference on Women in Beijing became a forum for examination of notions of universality and cultural or religious specificity and the implications for women's human rights.[141] Charlotte Bunch et al. write that "Women sought to maintain the Vienna World Conference on Human Rights' recognition that women's human rights are universal, inalienable, indivisible, and interdependent" despite the attempts by some governments to limit the extent of universal application of women's human rights by invoking a "feminist imperialism that reflects disrespect for religion and culture, an over-zealous individualism, and an effort to impose western values which destroy the family and local communities."[142] Clearly, rights need to be vigorously defended against state power, against governmental positioning in internal politics, and against erosion through fundamentalisms and traditions. The tension between the universal human rights of individuals and the rights of groups, including aboriginal rights, is not reducible to a formula that priorises survivance of groups, defined by the powerful within them, at the expense of certain individuals within them. Because these individuals will most likely be outside of the consensual fold of majority opinion within the group, it is especially important that their fundamental rights be guaranteed. Even where a particular group is itself in a minority position in society, survivance cannot translate into a dispensation to suspend international norms of the treatment of individuals. Nor may culture be invoked in defence of practices which violate fundamental human rights because culture is not axiomatically beneficial nor is it immutable. Those who have been marginalised within societies struggling for cultural and political integrity are vulnerable to repression in the name of the collectivity's goals. Finally, exit is no solution to intolerable or abusive conditions within a 'minority' group.

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[140] Marilyn Waring, Three Masquerades: Essays on Equality, Work and Human Rights, University of Toronto Press, Toronto, 1997.

[141] Charlotte Bunch, Mallika Dutt, and Susana Fried. "Beijing '95: A Global Referendum on the Human Rights of Women", Canadian Woman Studies Vol.16, No.3, 1996, at 11.

[142] Ibid.

Rather, it is an infringement of the rights of the individuals forced out of their cultural and familial community.[143] Regardless of the spotted history of oppression between groups, there is no compelling ethical or legal reason to legitimate even the potential for the repression of internal minorities.

Human rights guarantees are essential for human dignity in contexts where overwhelming power rests with governments, corporations, and dominant individuals and sectors of societies. They are also essential as the foundation of political agency, or citizenship. People cannot participate in public life in any meaningful fashion if their fundamental human rights are circumscribed. Aboriginal governments in Canada are not outside of the conversations about or practices of citizenship -- not necessarily or only defined as a relationship with the state, but fundamentally, as the relationship of individuals with their governments, their communities, and the practices of power that configure their lives.

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[143] Leslie Green, "Internal Minorities and Their Rights", 108-111. See, also, Section 27 of the International Convention on Civil and Political Rights, which protects the right of the individual to live in her socio-cultural community.

Chapter Five

Intersectionality and Authenticity: Exploring Identity and Citizenship

Introduction

This chapter examines the problem of contemporary citizenship as the way in which people understand themselves to be citizens, not simply as autonomous rights-bearing individuals in relation to the modern state but also, and perhaps especially, as members of communities. I begin with the liberal democratic picture of universal citizenship. Then, I examine how citizenship is differentially constructed and experienced. I consider the claims of indigenous nations to control citizenship in a context of decolonisation while continuing to endure the superordinate structure of the state. Finally I examine in detail the problems facing a segment of the Canadian population whose citizenship has been constrained; Indian women who have, by colonial history, colonial legislation, and by both colonial and indigenous patriarchy, been involuntarily exited from their communities of origin. This reality, and their resistance to it, raises questions about what citizenship is relative to Indian government in Canada, and relative to indigenous people as Canadians.

I treat citizenship as an evolving relationship of individuals with state and community, and as an aspect of political solidarity. I focus on that segment of indigenous women who identify as indigenous and as Canadian, and often, as feminist. Part of the project considers the multiple identities and locations -- the experiential and subjective filters -- which comprise a multi-dimensional web shaping the expression of citizenship. Imagine, if you will, that this web is suspended in time, so that subjectivity is at a nexus of collective history and personal experience.

Identity, then, is a process of self-knowledge. "An epistemology", writes MacKinnon, "is a story of a relation between knower and known."[1] The epistemology of identity, like that of citizenship, is a process which stagnates when it is ossified, captured at a point in time, denied evolutionary capacity or contemporary relevance. Above all, it stagnates when it is no longer a consequence of relationship between knower and known. Indigenous women have largely been read out of descriptions of indigenous and female identity, in ways that leave both epistemologies deficient and indigenous women invisible or stereotypical.

This chapter looks at the problems posed by existing and potential conflicts between indigenous governments and the Charter guarantees of rights and freedoms, by examining the Sawridge case[2] and by foregrounding what Emma LaRocque calls "the many-layered oppression of Native women".[3] In this project, it relies on the self-construction of indigenous women's identity as both specifically indigenous and specifically gendered. Indigenous women are historically located in subordinated nations and in the subordinating colonial state, which has used racism, and economic and physical violence to maintain its dominance. They are also constructed as women in at least two sets of societies that are characterised by patriarchy, maintained by actual and potential violence against women and by social structures maintaining male privilege. Indigenous women cannot choose which identity to foreground, as they are all of their experiences and identities all of the time. Their identity, and their citizenship, is comprehensive of history, politics, biology, and social relations. This web of experiences forms the reality in which indigenous women find themselves -- not all identically, but all comprehensively.

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[1] Catharine MacKinnon, Towards a Feminist Theory of the State, Harvard University Press, 1991, at 96.

[2] Sawridge Band v. Canada [1995] (FC-Trial), currently under appeal to the Federal Court of Appeal for June 1997.

[3] Emma LaRocque, unpublished paper, Department of Native Studies, University of Manitoba, 1996, at 17. Hereafter "Relationship of Gender to Issues of Self-Government".

Defining Citizenship

The notion of citizenship is derived from the western liberal politico-philosophical traditions articulating political emancipation and action in empowered (male, propertied, and other ways designated part of the 'we' community) individuals. Contemporary notions of citizenship include the reciprocal relationship of citizen and state rights and obligations, guarantees of liberty from state interference in private life and state guarantees of equality of citizen rights, and community or solidarity.[4] Notwithstanding the popular misunderstanding of the neutral nature of Canadian citizenship, it historically and until recently has been exclusionary on bases of sex and ethnicity.[5] Despite obtaining the federal franchise in 1919, until 1947 white women still could lose or gain Canadian citizenship status upon marriage to an alien or a citizen,[6] a sexist patriarchal formula reminiscent of the status provisions of the Indian Acts from 1869 to 1985 and further evidence of the colonial origins of the sexist status provisions of the latter. Indeed, the Royal Commission on the

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[4] Jane Jenson, "Citizenship and Equity: Variations Across Time and in Space", Political Ethics: a Canadian Perspective (Janet Hiebert, ed.), Dundurn Press, 1991, at 195-96 and 201. Jenson calls community and solidarity 'fraternity'.

[5] For example, white women obtained the federal vote in 1919, Indian men and women could vote federally as of 1960, while Indian men and women could not vote in Quebec till 1969.

[6] Report of the Royal Commission on the Status of Women in Canada, Supply and Services Canada, Ottawa, 1970, at 362.

Status of Women recommended amending the Canadian Citizenship Act to remedy a host of similar sex and ethnicity based discriminations.[7]

Citizenship has come to be thought of as universal and unmediated. That is, all persons hold citizenship in a state, and this citizenship is, for all state citizens, a set of rights, duties and relationships. As understood by contemporary international law, citizenship is vested in a rights and duties-bearing individual located in a state, equal to all other citizens in respect of those rights and duties. This conception of citizenship is neutral in the sense that it is undifferentiated and unmediated and so is experienced and expressed in the same way by all citizens. The weight of scholarly opinion holds that citizenship is most fully actualised in the conditions of democratic society. Democracy, in turn, is conceptualised as the ability of citizens to participate in public life authentically and freely. Democratic practice is deemed to legitimate government, and includes such activities as voting, seeking political office, organising, and speaking without fear of repression.

While there has been more attention paid to the significance of the differential social and economic location and the cultural identity of citizens, a consensus on the conceptual parameters, and on the political implications of difference for citizenship practice has yet to emerge. Theorists of differentiated citizenship have made some compelling arguments for facilitating inclusion of all citizens by recognizing in politically significant ways their different identities and differential locations. Charles Taylor's notion of 'deep diversity',

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[7] Ibid at page 363, recommendation 18. "(W)e recommend that the Canadian Citizenship Act be amended so that there is no difference between the residence requirement for the acquisition of Canadian citizenship by an alien husband and an alien wife of a Canadian citizen." Recommendations 19, 21, 22, and 23 also deal with sex discriminatory provisions of the Canadian Citizenship Act.

James Tully's proposal for mutual recognition, Will Kymlicka's search for a theory of differentiated yet unifying citizenship, Iris Young's arguments for universal inclusion based on different specificities, Anna Yeatman's examination of the specific community bases of individual rights, and Avigail Eisenberg's effort to find respect for identity-based difference as an alternative to rights hierarchies, are some of the most compelling of these contributions.[8] However, while these works go some distance to creating the theoretical foundation for an inclusive Canadian citizenship, they do not answer the question of rights of indigenous peoples in relation to settler states, and that is the question driving Canadian - indigenous relations at present.

Young argues:

> With equality conceived as sameness, the ideal of universal citizenship carries at least two meanings in addition to the extension of citizenship to everyone: (a) universality defined as general in opposition to particular; what citizens have in common as opposed to how they differ, and (b) universality in the sense of laws and rules that say the same for all, and apply to all in the same way; laws and rules that are blind to individual and group differences.[9]

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[8] Charles Taylor (Guy Laforest, ed.), Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism. McGill-Queen's University Press, Montreal & Kingston, 1993 (herafter Reconciling the Solitudes); James Tully, Strange Multiplicities: Constitutionalism in an Age of Diversity, Cambridge University Press, Cambridge, U.K., 1995 (hereafter Strange Multiplicities); Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights, Clarendon Press, Oxford, 1995 (hereafter Multicultural Citizenship); Iris Marion Young, Throwing Like a Girl and Other Essays in Feminist Philosphy and Social Theory, Indiana University Press, 1990 (hereafter Throwing Like a Girl); Anna Yeatman, "Beyond Natural Rights: The Conditions for Universal Citizenship", Postmodern Revisionings of the Political, Routledge, New York, 1994 (hereafter Postmodern Revisionings); Avigail Eisenberg, "The Politics of Individual and Group Difference in Canadian Jurisprudence", Canadian Journal of Political Science XXVII:1, March 1994 (hereafter "The Politics of Individual and Group Difference").

[9] Iris Marion Young, "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship" Throwing Like a Girl and Other Essays in Feminist Philosphy and Social

same way; laws and rules that are blind to individual and group differences.[9] Furthermore, equality of treatment of those who are not similarly located perpetuates inequality.[10] Young argues that by affirming the different locations of citizens in terms of historico-cultural consciousness, gender, class, and so on, it is possible to create a genuinely inclusive citizenship; conversely she argues that by denying crucial difference in the name of universality, universality itself is frustrated.

Anna Yeatman argues that the dominant discourses of citizenship are premised on systemic exclusion of those deemed to be 'other'; and they theorise self-determining citizen communities whose consensus legitimises the state's existence and its exercise of power. The notion of 'community' is based on assumptions about closure and exclusion; community is a "shared order of being".[11] Those who contest this have, in theory, the right of exit.

But Yeatman argues that individual rights are held because of the individual's membership in community and their exercise depends on the community upholding these rights.[12] Recognition of community is a central part of the foundation of citizenship. For Yeatman, then, the notion of citizenship must be conceptualised in the context of community. Without the context, citizenship is irrelevant and perhaps impossible. The state is not other than the citizens; it is the embodiment of all of its citizens. In order to incorporate 'others' with any measure of substantive justice, both theory and practice must embrace difference as valid and relational, and must be designed to eliminate structural subordination because of difference. One of the tasks of citizenship, then, is to create justice between communities in heterogenous societies, a justice which is characterised by attention to consequentiality and so becomes a negotiated compromise.[13] Individual rights depend on cultural and institutional guarantees of the citizen community,[14] though Yeatman does not address situations where individuals are oppressed by citizen communities within states, nor where individuals hold affiliation with more than one community. Yeatman, then, has citizenship constituted through community affiliation, and rights held within state communities and articulated through citizen communities. This requires more attention to resolution of conflict and of internal domination than the obeisance to community self-determination suggests. Social, political and civil rights are the state response to social and institutional forms of domination.[15] Contestation of relations of dominance becomes part of the process of negotiation and redefinition, rather than a move towards voluntary or involuntary exit.

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[9] Iris Marion Young, "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship" Throwing Like a Girl and Other Essays in Feminist Philosphy and Social Theory, Indiana University Press, 1990, at 114.

[10] Ibid at 115.

[11] Anna Yeatman, "Minorities and the Politics of Difference", Postmodern Revisionings of the Political, Routledge, New York, at 80. Hereafter "Minorities and the Politics of Difference".

[12] Anna Yeatman, "Beyond Natural Rights: The Conditions for Universal Citizenship", Postmodern Revisionings of the Political, Routledge, New York, 1994, at 58. Hereafter "Beyond Natural Rights".

Charles Taylor examines the significant differences between citizens in terms of historical and cultural location, and suggests that Canadian citizenship would be more fully manifested through theorisation of 'deep diversity'.[16] That is, while some kinds of Canadians will understand their ethnic, historical and other locatedness to be secondary to their relationship with the Canadian state and therefore simply a descriptive form of diversity, there are other Canadians to whom these are fundamental, and through which the relationship with the Canadian state is mediated. Quebecois and indigenous peoples are Taylor's examples; these collectivities' understanding of themselves as Canadians is filtered through their location as cohesive historico-cultural entities with a package of relationships with Canada. The Charter, writes Taylor, enshrines "first-level diversity", premised on the notion of what it is to be Canadian that transcends, or includes, differences.[17] But a common citizenship, a shared allegience, requires "second-level or 'deep' diversity, in which a plurality of ways of belonging would also be acknowledged and accepted" and Taylor argues that "deep diversity is the only formula on which a united federal Canada can be rebuilt".[18] For Taylor, cultural identity is essential for reflection back to self of identity: "Outside this culture, I would not know who I was as a human subject."[19]

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[13] Anna Yeatman, "Minorities and the Politics of Difference".

[14] Supra at note 13.

[15] "Beyond Natural Rights" at 74.

Canada's question, yet to be answered definitively, is "(w)hat ought to be the basis of unity around which a sovereign political entity can be built?"[20] Alternatives exist because of the historical circumstances, continuing as memory, convention, and communities, which

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[16] Charles Taylor, Reconciling the Solitudes.

[17] Ibid at 182.

[18] Ibid at 183.

[19] Ibid at 45.

[20] Ibid at 157.

"exist as a challenge to self-justification because they existed historically and we retain the sense that our existing arrangements emerge out of a choice that excluded them."[21] It is through recognition and acceptance of this 'deep diversity' that Canadian citizenship can be meaningful for these populations, and that resolutions (like asymmetrical federalism) can be found to current constitutional logjams.

Young and Taylor both theorise difference in relation to citizen location and authenticity. This is a significant challenge to the universalistic assumptions of classical citizenship theory, which identifies the neutral citizen as equal in rights and duties to all other citizens. Classically, difference is irrelevant, at least in relation to citizenship. For the difference theorists, it is a politically significant mediator of citizenship and foundational to identity.

Citizenship, for Will Kymlicka, is "an inherently group-differentiated notion" and a fully integrative citizenship must take differences into account.[22] But "citizenship" also means membership in the body politic of the state. It is held individually in the collectivity of the state's legitimated population; it is a "shared experience or common status."[23] How, then, asks Kymlicka, can citizenship exist where it is differentiated on the basis of group membership?[24] Rather, should citizenship not be the umbrella under which differences gather, which creates a focus on the common good rather than on the particular good of groups under that umbrella? The basis of pan-citizenship across the differentiated peoples is shared political values, argues Kymlicka.[25]

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[21] Ibid.

[22] Will Kymlicka, Multicultural Citizenship, Clarendon Press, Oxford, 1995, at 124 and 181.

[23] Ibid at 175.

[24] Ibid at 174.

While he doesn't disagree with either Taylor or Young, he warns against viewing differentiated citizenship as a means of alleviating social lacks in citizenship, lest the significance of difference be eliminated when inequality is seen to be eliminated. That is, he argues that difference must be conceptualised as an inherent part of citizenship: as a characteristic or right, not as a condition amenable to amelioration.[26]

Kymlicka distinguishes between multinational states, "where cultural diversity arises from the incorporation of previously self-governing, territorially concentrated cultures into a larger state", and polyethnic states, "where cultural diversity arises from individual and familial immigration".[27] Polyethnicity generally leads to demands for inclusion, not for separate status from the larger society.[28] Multinationality, however, can produce a range of political responses from liberation movements through to calls for politically significant self-governing powers. States containing more than one nation are multinational states, with the smaller members forming 'national minorities'[29] which are not racial or descent groups but cultural groups.[30] Shared identity is problematic for multinational states, precisely because the historical impulse producing multinationality is almost always colonial imposition.

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[25] Ibid at 187.

[26] Ibid at 191.

[27] Ibid at 6.

[28] Ibid at 176.

[29] Ibid at 11.

[30] Ibid at 23.

Kymlicka suggests that shared identity as well as shared political values is essential for the conditions for pan-citizenship and that history can provide the common identity, the basis of solidarity.[31] But as I discuss in Chapter One, it is history that undermines solidarity. The history of the state is simultaneously the history of the oppression of indigenous peoples, and it compromises contemporary citizenship identification and practice for indigenous peoples.

Some scholars see difference as politically irrelevant, or as damaging to the state and ultimately to citizenship. Katherine Fierlbeck, for example, takes identity to be private and personal and therefore to be indeterminate and idiosyncratic. It is not an appropriate source of rights and drives people to fixate on difference rather than on commonality.[32] And Alan Cairns has indicated some discomfort with the implications of political contestation based on difference, again, as a divisive force in the collective project of citizenship.[33]

For Cairns, rights and collective identities, articulated via constitutional language, are seen as divisive and moving Canada from a constitutional preoccupation with federalism to group self-consciousness as constitutional claimants. The focus moves from governments to citizens, fragmented by these 'new' consciousnesses; 'new cleavages' "related to sex, ethnicity, the aboriginal communities, the disabled, and others"[34] (what Cairns elsewhere calls 'constitutional minoritarianism'[35]). This is a consequence of the Charter, which has stimulated both theorisation and activism around the notion of rights, a formulation of "citizen-state discourse (which) is a counter-discourse to the traditional language of federalism".[36] This new discourse is evidence of democratisation but Cairns has reservations about the ability of federalism, which is about distributions of powers between governments, to accommodate what he understands to be 'new' and potentially destabilising claims on it. Cairns is concerned that the post-1982 Canadian constitution's internal contradictions, produced by the opposing impulses of "the Charter and Section 35 and the amending formula", are fundamentally incompatible and produce constitutional paralysis.[38] The constitution is both an elite-driven structural arrangement (as manifested by the amending formula and arguably by s.33) and a 'citizens constitution' through the Charter, recognising and affirming a variety of differences as part of the Canadian character, to be protected against discrimination by governments. These 'Charter Canadians', argues Cairns, fragment Canadian identity by locating themselves by difference from the (implicitly white male) norm.[39]

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[31] Ibid at 188-189.

[32] Katharine Fierlbeck, "The Ambivalent Potential of Cultural Identity", Canadian Journal of Political Science XXIX:1, March 1996.

[33] Alan Cairns, Charter versus Federalism: The Dilemmas of Constitutional Reform. McGill-Queen's University Press, 1992.

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[34] Ibid at 3.

[35] Alan Cairns, Disruptions: Constitutional Struggles, from the Charter to Meech Lake (Douglas E. Williams, ed.), McClelland and Stewart, Toronto, 1991, at 9. Hereafter Disruptions.

[36] Ibid at 4.

[37] Ibid.

[38] Alan Cairns, personal communication, February 26, 1997.

Here, it is useful to consider Linda Trimble's sketch of difference and universality. Trimble suggests that the contemporary Canadian angst about the changing nature of citizens' self-understanding and participatory claims in defining the nature and structure of the state is a healthy one. She argues that the resulting tensions can be resolved through flexible federal structures and inclusive constitutional and Charter provisions, and the result will be a more empowered, engaged, democratic population.[40] For Trimble, then, the process of political engagement is more significant than the structure, which for Cairns defines participation in sometimes contradictory ways. And for Trimble, differences are relative to each other; for Cairns, they are relative to the largely uninterrogated norm. The priority of process or structure, the question of which serves which, and the significance of distinctions among citizens, in many ways define the difficulty attending conversations about Canadian political evolution and citizenship construction.

Rights are central to citizenship, though so is responsibility. Rights are held by individual citizens, but the context in which they are expressed is social, cultural, collective. As I explained in Chapter Four, the dualism of either individual rights or collective ones is false: rights theory requires both, and requires consideration of context as well.

The above scholars illuminate practices of citizenship, of especially Canadian constitutionalism and federalism, and the role and significance of rights claims. Their work suggests a complex and evolving understanding of the relationship of identity as subject-position on citizenship capacity, and how rights claims support or ignore difference as politically salient. Here, these views are synthesised to produce a multi-focal lens with which to view the tensions raised by indigenous women's citizenship and human rights claims. Inclusive citizenship requires affirmation of significant differences, that, in the case of indigenous peoples incorporated in settler states, includes the need for 'deep diversity'. Difference is a politically significant marker requiring different policies from the state, though I locate the significance of aboriginal difference in historically located rights, not in difference qua difference. The dominant discourses of citizenship are exclusionary and incomplete and ultimately, both self-justificatory and oppressive. At the same time, the location of citizenship in community is tied to the community's guarantee of the human rights of all its members. Citizenship in the Canadian context must be differentiated, but as a right, not as a consequence of oppression lest that definition exclude the possibility of elimination of oppression; or alternatively, lest oppression become the defining characteristic of politically significant difference. The state has the capacity to create inclusive and non-oppressive practices and structures through which genuinely inclusive citizenship can be practiced; this despite the contradictory impulses of elitism and democracy inherent in the Canadian constitution and political conventions. These issues are examined in further detail in the exploration of the nature and parameters of Indian women's citizenship.

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[39] Alan Cairns, Disruptions.

[40] Linda Trimble, "Beyond Gloom and Doom: Federalism, Citizenship, and Political Change", presented to The Future of Federalism, an international conference sponsored by the University of Calgary and the Gorbachev Foundation, Calgary, March 24-25, 1993:6; published in Federalism and the New World Order (Stephen Randall and Roger Gibbins, eds.), University of Calgary Press, Calgary, 1994.

Filters of Indian Women's Citizenship

The factors of gender, class, patriarchy, colonialism, nationalism and traditionalism, and racism, affect how indigenous women understand and practice citizenship. These subjectivities are experienced in a context where other forces construct possibility for political expression for all citizens (most notably the neoliberal transformation of the state). Finally, the construction of citizenship is not settled for some social collectivities. Certainly, within the indigenous community there is no consensus on whether individuals are citizens of Canada, are simultaneously citizens of Canada and an indigenous nation, or are only citizens of the indigenous nation. Nor is there consensus among indigenous peoples on the relevant indigenous political unit. Colonial imposition of bands structured by the Indian Act has created the popular but erroneous belief among natives and non-natives that bands are also nations.

The subject of this chapter arises because of the imposition of colonial administration on bands; the question of 'membership' or 'citizenship', designating 'status' of Indian people, originally for the administrative purposes of the federal government, but now also as an exclusionary mechanism imposed by some bands. The norms of Euro-patriarchy were historically imposed by colonial administrations and their intellectual and political colleagues, Christian missionaries. The forms of Euro-patriarchy, along with colonial bureaucratic forms and western intellectual assumptions about relative development, were incorporated into the administrative tool of choice, the Indian Act. Initially, the Act clearly did not contemplate "Indians" as citizens. Rather, Indians were treated as incompetents needing discipline, tutelage and organisation in order to transcend their social evolutionary and cultural state; that is, in order to obtain the higher standing of Western civilisation. In return for this blessing, they gave up their land; that is, it was stolen. In transforming indigenous societies in all their variety to mimic the European model, successive Canadian governments imposed social forms through the Indian Act, including the socio-political unit of the band and its legislated mode of governance, Chief and Council.

Of particular interest here is the imposition and reinforcement of the patriarchal, patrilocal family; the location of political, cultural, religious and economic power in the male household head and the legal subordination of women and children to the familial patriarch, father or husband. This was done in tandem with the government's need to identify those Indians for which it legislated. That is, it reflected the government's need to define Indians through a formula that conferred what became known as "status". Not unrelatedly, the political structure designed to 'govern' reserves, that of Chief and Council, was intended to be occupied by male incumbents. So Canada's administrative tool, the Indian Act, was thoroughly imbued with sexist, racist and other assumptions about power, legitimacy, and agency.

It is largely through the combined history of the imposition of the Indian Act, supplemented by racist, assimilative education and religion, that transformative processes occurred within indigenous communities. The differential process of internalisation of colonial assumptions has created tensions within communities between those who advocate different political visions and processes. Significantly for this discussion, some, perhaps many, bands have internalised the exclusionary status provisions of the pre-1985 Indian Act and now replicate these in band 'citizenship' codes. Some bands, themselves traditionally patriarchal, have found no cultural dissonance in the status exclusion of women, and continue the sexist exclusion of the pre-1985 Indian Acts in contemporary citizenship codes and band constitutions.[41] And certain (small, wealthy[42]) bands seem to seek the smallest number of members in order to maintain wealth and power,[43] and they invoke tradition and constitutional law as justification of their continuing sexist and sometimes racist exclusion of certain women and their often ethnically diverse children; that is to say, children of "mixed race".

The notion of 'race' is problematic, as human beings are the species, rather than the ethnic variations within it. The notion of 'race' has no parallel in biological terminology applied to variations within any other species. As I discussed in Chapter One, it is designed to separate in a hierarchical fashion variations within the human species, to the benefit of those who conceptualised these stratified variations and to the detriment of others, produced by innate 'racial' characteristics. 'Race' has emerged as a 'common sense' way of referring to different kinds of people, but it is profoundly political and illegitimate. At the same time, one must be careful not to dismiss the consequences of race categorisation along with the legitimacy of the race construction, because to do so dismisses the real material consequences, known as racism.[44]

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[41] This argument is made by the plaintiffs in Twinn.

[42] For example, the Sawridge Band, represented by Chief Walter Twinn in the Twinn case, has 44 members, 20 of whom live on the reserve, and assets of over $100 million, excluding the Sawridge Band funds held in trust by the Department of Indian Affairs. Cited in Appendix 3, pages 56-58 of the Memorandum of the Native Council of Canada, Native Council of Canada (Alberta), and the Non-Status Indian Association of Alberta, intervenors in the case.

[43] Sally Weaver, "First Nations Women and Government Policy, 1970-92: Discrimination and Conflict", Changing Patterns: Women in Canada (2nd) (Sandra Burt, Lorraine Code, and Kindsay Dorney, eds.), McClelland and Stewart, Inc., Toronto, 1993, at 118.

There is an emerging Canadian consciousness of colonial oppression. This is accompanied by at least some commitment to inclusion of indigenous nations within the body politic (though not at the expense of the legitimacy or integrity of the state). The Constitution affirms the inherent aboriginal right of governance, and arguably, an accompanying right of control of membership/citizenship. It also affirms the fundamental equality of men and women, including indigenous men and women. The tensions around citizenship beg for resolution.

The Indian Act of 1951, which was not substantially amended until 1985, defined in a uniform fashion "band", "status Indian" and "band member" for the purposes of the Act.[45] The band unit was a creature of the Indian Act, defined in section 2(1) as: "a body of Indians", for the use of whom lands have been set aside and in which title is vested in the Crown; and for whose use and benefit in common monies are held by the Crown; and who are declared by Parliament to be a band for the purposes of the Indian Act.

Notions of status and enfranchisement were "creations of Anglo-Canadian colonial policy".[46] Status Indians are defined in the 1951 Act in sections:

> 11(1)(d) A legitimate child of a status Indian man;
> 11(1)(e), An illegitimate child of a status Indian woman unless protested out of the Band on the basis that their father was not a status Indian; and

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[44] ,Sherene Razack, keynote presentation to the conference "Educating in Global Times", University of Alberta, March 14-15, 1997.

[45] The Native Council of Canada (NCC) Memorandum, Twinn, at page 7.

[46] Native Council of Canada Memorandum, in Twinn, at page 7.

> 11(1)(f), A woman married to a status Indian man.[47]

Status was lost under the 1951 Act as follows:

> 12(1)(a)(iii), Those who enfranchised;
> 12(1)(a)(iv), Those born of a marriage entered into after September, 1951, whose mother and paternal grandmother did not inherit Indian status at birth: the 'double mother rule'; and 12(1)(b), Those who married a man who did not have Indian status.[48]

Under the 1985 amendments, the band unit remains a creature of the Indian Act. However, the status and band membership criteria in the 1951 Act were replaced and new provisions made it legal under the Act for bands to create and maintain membership lists, further to band membership codes. The C-31 amendments defining status -- which remains the designation by federal legislation for federal administration purposes -- are contained in section 6 of the 1985 Indian Act. Status is distinguished from band membership, where bands have 'taken over' band lists further to band membership codes. However, bands are not entirely at liberty to eliminate persons from the band list, as section 11(1)(a) provides that any person on the band list as of April 16, 1985, is automatically on the post-C-31 band list.

The legacy of Indian Act exclusion is a group of women and their children who have been denied Indian status by the federal government until 1985, and with that denial, have lost political, social, cultural and economic rights incident to Indian status. They were forced into exile, compelled to live in the dominant society, and denied the fundamental human right to practice their culture in community[49]. Their children were deprived of any chance of unconflicted identity and of the differentiated citizenship which is their heritage and their reality.

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[47] Cited in the Native Council of Canada Memorandum, ibid.

[48] Ibid at 8.

Impelled by the coming into force of equality provisions of the Charter, the 1985 "C-31" Indian Act amendments sought to remedy this by eliminating the offensive section 12(1)(b) (which stripped Indian women of status when they married anyone other than a status Indian male) and creating a mechanism for the reinstatement of women who had lost status because of marriage, and to provide for instatement of children of such women.[50] At the same time, C-31 provided a mechanism for bands to create membership codes which would supersede the membership provisions of the 1985 Indian Act. The federal government would maintain a general list of 'status Indians', on which the affected women and second-generation children could automatically be placed. However, some bands subverted the intent of the amendments by promptly passing membership codes which continue the exclusion, in some cases expanding it, and which certainly violate the Charter of Rights and Freedoms in significant ways. A new class, the C-31 Indians, was created. These people belonged to no band but only to that general list maintained by the Registrar for the Department of Indian Affairs. Now it is possible to "have status" without having a community of origin; or rather, without being able to exercise the political, economic, social and other rights associated with belonging to a band.

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[49] See the case of Sandra Lovelace, United Nations Human Rights Commission 6-50 M 215-51 CANA. The decision found Canada in violation of section 27 of the Covenant on Civil and Political Rights, for preventing Lovelace, by operation of the exclusionary membership provisions of the Indian Act, from enjoying her culture, professing and practicing her religion, and using her language.

[50] An excellent discussion of the political context of the creation of C-31 is provided in Sally Weaver, "First Nations Women and Government Policy, 1970-92: Discrimination and Conflict", Changing Patterns: Women in Canada (2nd) (Sandra Burt, Lorraine Code, and Kindsay Dorney, eds.), McClelland and Stewart, Inc., Toronto, 1993.

The federal government which, having created this mess, could reasonably be expected to engage with the need for resolution, has effectively abandoned the matter, hiding behind the propaganda that it so respects the right of bands to govern themselves that it will not intervene. "C-31" Indians are twice disinherited: first, by their communities, and then by the Government of Canada, both invoking the right of aboriginal 'self' government for their stance. Those who wish to contest band continuation of sex and race discrimination under the guise of self-determination need to have information, organisation and money in order to fight this, and the affected people, most of whom are marginalised women, do not have these resources.

Governance and Citizenship

Since colonisation and since the historic treaty-making period, from the imposition of the first Indian Act to the present day, indigenous resistance has claimed the right to self-determination. This self-determination has been historically abrogated by the activities of imperial states acting through corporate agents such as the Hudsons Bay Company (and more contemporary corporations, such as Daishowa, pillaging trees for pulp on unceded Lubicon Cree land in northern Alberta) as well as through colonial agents and then through the nascent settler state. It has been resisted by indigenous nations contesting colonial legitimacy through diplomatic and political action, as well as by military resistance.

After years of directly denying the legitimacy of this claim, the federal and provincial governments have moved to the tactic of co-opting the language of liberation to re-present government offers of limited land claims and self-administration. Governments have largely driven the pace of the 'self'government debate, as well as defining the parameters of negotiations. This has placed administrative matters at the head of the agenda, and obscured the historic challenges to both state legitimacy and its accountability for injurious policies inflicted on indigenous peoples, in what should now be unacceptable violations of democratic principles. But it has been largely successful: governance, or 'self-government', is now the accepted terminology referring not to self-determination nor to constitutional negotiation, but simply to administrative delegation.

It is this formula that defines packages such as the Community-Based Self Government initiative of the federal government, now 'rolled over' into the so-called Inherent Rights Policy, as well as much of the rhetoric of bands taking on 'new' responsibilities. The loci of control, of accountability, of policy direction and so on are often in conflict. Take the case of 'citizenship', or membership.

Bands, themselves legal constructs of and for the federal Indian Act, now may develop 'membership' codes, which is articulated by some as control of citizenship. But is this citizenship? Is citizenship a relationship between individuals and a corporate entity, such as a municipality or between an individual and a legislated entity, such as a band? Is citizenship not a relationship with a significant cultural and political community, such as a nation? And if citizenship is an appropriate term for membership in a nation, most bands fail to meet the test of nationhood. At best, they are parts of nations; at worst, they are wholly federally created amalgams of fragments of nations.[51] The adoption of the term 'First Nation' by all bands may be useful for the politics of decolonisation, but it also facilitates the conflation of colonial creations with indigenous structures, and ultimately may contribute to the trivialisation of the right of self-determination.

A yet to be explored matter by First Nations are the citizenship implications of claiming nationhood. In international law, nationality is a fundamental human right, of which persons may not be deprived. While international law contemplates states as the originators of nationhood, socio-political entities existing parallel to states and claiming political incidents of nationhood will be expected to conform to international norms of nationhood.

Whether citizenship is an appropriate term for the relationship of individuals to bands needs some examination. It seems that citizenship should attach to the nation, to the entity to which bands belong, rather than to the Indian Act created and controlled communities that now claim an inherent right to most of the incidents of self-determination. If nations are the proper body in which to locate a right of governance, or of citizenship, it may still be that the bands currently existing will form the relevant administrative units of this power. But the location of the right is significant, not least because it avoids trivialisation of the right.

Assuming that control of citizenship is a right of self-determining nations, it remains doubtful that this right may be exercised in ways that are sexist and racist, in violation of international law. The plaintiffs in Sawridge suggest that the right supersedes the Charter, and while its practice by the plaintiff bands through membership codes was sex and race discriminatory, it was justified because of indigenous traditions. There is no internal unanimity about the significance of tradition in indigenous or other societies. Invoking tradition has been a tactic of many governments around the world intent on violating rights. Feminist theory has shown that it is precisely in the cultural, social, and theocratic social institutions that women's oppression is to be found, most obviously because it is in that so-called 'private sphere' that women are largely confined. Removing tradition from scrutiny, and from accountability to the universal norms of ethical governmental conduct, legitimates women's oppression.

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[51] For example, the Woodland Cree First Nation, created by the Department of Indian Affairs in order to siphon off support from the leadership of the Lubicon Lake Cree, is in social and political terms a figment of the federal imagination. Another example is provided by the Sawridge band which, as discussed in Chapter Four, is part of the original Keenoosayo's band that signed the treaty.

Further, despite the assertion by some that aboriginal governance will be grounded in collective responsibilities and cultural tradition, there is a logic emerging which lends itself to essentialism and romanticization. As Emma LaRocque puts it, "racism from the outside and gender domination on the inside have been routinely whitewashed under the rubric of "cultural differences".[52] So constructed, they are taken by indigenous and non-indigenous politicians and by all too many academics to be inoculated from critique.

The Sawridge Case

The court case of Twinn et. al (Sawridge Band v. Canada [1995][53]) illuminates several problems involved with citizenship of marginalised others. In this case, the plaintiffs[54] contest the constitutional validity of sections 8 through 14.3 of the Indian Act R.S.C. 1985 (the C-31 membership sections), arguing that they violate Section 35 treaty and aboriginal rights[55] as well as section 2(d) Charter associational rights. The relevant sections of the Indian Act reinstate band members and their children who were deprived of Indian status primarily because of section 12(1)(b) of the pre-1985 Indian Act, which tied women's status to that of their father or husband. One consequence was that women who married anyone other than a status Indian man lost their own Indian status, and their children could not hold status.

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[52] Emma LaRocque, "Relationship of Gender to Issues ofSelf-Government", at 23.

[53] F.C.J. No. 1013; Action No. T-66-86. Federal Court of Canada -- Trial Division; Muldoon J. Hereafter Twinn.

The appellants asserted two aboriginal rights: (1) the right to exclude women who married non-Indians; based on aboriginal custom that "upon marriage the woman followed the man to reside in or at his ordinary residence within his tribal group, not hers", that is, the tradition of patrilocality/patrilineality; and (2) "that control of membership is an inevitable incident of their ancestors' "organised societies" " and so is a surviving aboriginal right protected by treaty.[56]

The appellants sought a declaration that sections of the C-31 amendments to the Indian Act are inconsistent with parts of s.35 of the Constitution Act 1982, by imposing a membership regime upon bands contrary to existing aboriginal and treaty rights, as established by the appellants' historical existence in organised societies; and the absence of any statute or treaty extinguishing the right of organised societies to determine their own membership; and without regard to band wishes. They argued:

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[54] Walter Twinn on behalf of the Sawridge Band; Wayne Roan on behalf of the Ermineskin Band, and Bruce Starlight on behalf of the Tsu'u Tina Band.

[55] Constitution Act 1982.

[56] Twinn at 44.

> The 1985 Amendment imposes members on a band without the necessity of consent by the council of the band or the members of the band itself and, indeed, imposes such persons on the band even if the council of the band or the membership objects to the inclusion of such persons in the band.[57]

Sawridge et. al rejected application of the Charter's gender equality provisions, arguing that "you can't have special status and integrity of special status if you permit equalitarian norms to invade it constantly" and further,

> If you permit the values of society at large to be used as a justification to intrude upon the results of special status, then that really means there is no special status at all. ... That's what we're talking about when we say that Indian band communities have special rights that no one else has.[58]

But, the origin of the legal notion of 'band' lies in successive repressive Indian Acts. Several conceptual problems suggest themselves here: the notion of the legal entity of band, and its historical origin and present construction; the notion that "bands" rather than "peoples" hold "special rights"; and the proposition that special status is incompatible with egalitarian norms, which are somehow implicated as both un- and anti-aboriginal. These implicit and explicit propositions need to be taken up.

a. Indian Act Evolution

The evolution of the package of legislation known as the Indian Act demonstrates the attention of the Crown to increasing restriction of status and application of patriarchal measures for ascertaining status, as the colonial state consolidated its authority over indigenous peoples. The Acts were administrative legislation designed to codify a uniform administrative regime for Indians and bands, both of which are colonial constructs. They were intended to facilitate the orderly transition of what were viewed as primitive and homogenous peoples from their 'natural' state to one where incorporation into the dominant society would be feasible. Whether this was desirable was a question not considered. What is important here, then, is the continuity of these pieces of legislation in terms of their conceptualisation and intent: they were not foundations of rights, nor did they affirm rights.

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[57] Sawridge Band v. Canada [1995] F.C.J. No. 1013; Action No. T-66-86. Federal Court of Canada -- Trial Division; Muldoon J. Unedited manuscript at 28-29.

[58] Ibid at 37.

The Sawridge Federal Court transcript (unedited version) helpfully enumerates the Indian Acts from 1850 to 1985, showing the increasingly restrictive and sexist membership criteria imposed by the government. The imposition of what Sally Weaver calls "the male bias of Victorian Euro-Canadian culture"[59] is consistent with the racist assumptions of a colonial administration. It was, however, also a policy response to the practice of this patriarchal culture, demonstrated in the propensity of white men who married Indian women to lay claim to reserve lands.[60]

The Act also defines and provides for "enfranchisement" and "reserves", the latter as land "set apart by treaty or otherwise for the use of benefit of or granted to a particular band of Indians, of which the legal title is in the Crown". As with the earlier Acts, it prohibits non-Indians from residency or use of Indian lands, and extends the restrictions on the use of Indian lands. Continuing the patriarchal mode, the Act specifies that release or surrender of Indian lands shall be by assent of a majority of male members of the age of 21 years. Women were to have no political voice over the disposition of these lands.

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[59] Sally Weaver, "First Nations Women and Government Policy", at 94.

[60] Ibid at 95.

It is no mistake that the term "enfranchisement" was used. It refers to the citizen capacity to vote and to function as a citizen in political and legal terms. Without being enfranchised, Indians could not vote. They were subjects, but not citizens, of Canada. The conditions of their special status were embodied in the Indian Act; it was a status which the state thought to ameliorate over time as Indians demonstrated cultural, economic, and moral competence as measured by Euro-colonial norms.

The Indian Acts are unequivocally designed for colonial administration and to impose colonial norms. They are not derived from indigenous tradition, no matter how closely they may approximate certain communities' traditions. What is at issue is whether 'band' control of membership is an incident of section 35's imputed right of governance. Nothing in the Sawridge documentation establishes either the centrality of sex discrimination for the plaintiffs' cultures,[61] nor the affirmation of treaty and aboriginal rights in the exclusionary practices contested here. Nor is there clarity on the terms used to refer to the rights-holders' institutions. 'Bands' as referred to in the Indian Act are constructed by and for the Indian Act; that is, as tools of colonial administration. 'Bands' hold no rights other than the administrative powers granted in the Indian Act. Interestingly, this point was raised by Jean Potskin, who initially intended to join with the Crown as a defendant in the Sawridge case. Potskin, a member of the Sawridge Band, went to considerable trouble to participate in the case, and argued that "bands ... are statutory administrative units, created by Parliament, and are not an aboriginal collectivity to which aboriginal or treaty rights pertain."[62] If Indian Act 'bands' are the relevant unit, then, as Muldoon J. notes, "The plaintiffs' asserted right to control their own membership of their "bands" (a wholly statutory term) was emphatically extinguished by the Indian Act, 1876."[63] A right to control membership and citizenship may exist; certainly it is asserted in the Draft Declaration on the Rights of Indigenous Peoples. But the plaintiffs in Sawridge do not make a case for it vesting in bands, nor do they show the legitimacy of sex discrimination as an incident of such a right.

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[61] Sally Weaver notes that "Traditionally, the predominant principle of descent among the tribes was bilateral in that descent was traced equally through both the mother's and father's relatives." "First Nations Women and Government Policy", at 96.

b. Section 35 Rights

The plaintiffs argued that the right of governance includes the right of membership or citizenship control, affirmed in section 35 of the Constitution Act 1982, "existing aboriginal and treaty rights". They argued that aboriginal rights include customary laws and political institutions, and that these, as well as acquired or confirmed treaty rights to band self-identification, form a section 35 right of band self-identification of membership. Imposition of the amended Indian Act membership regime would, according to the plaintiffs, amount to extinguishment of these rights as well as violating freedom of association guarantees in section 2(d) of the Charter.[64]

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[62] Defence of the Defendant, Jean Potskin, Exhibit A, sworn in Alberta October 20, 1989, in Twinn (FC-Trial).

[63] Twinn, unedited manuscript at 62.

Again, while a compelling case may yet be made for a section 35 right of control of membership, the plaintiffs failed to convince the court. Returning to Treaty Commissioner Alexander Morris's records, Justice Muldoon held that the exclusion from treaty-making and benefits of half-breeds by Morris, despite petition by certain Indian 'negotiators', demonstrates quite conclusively

> that if there were an aboriginal right of control of membership it was conclusively extinguished at treaty time and as a condition of concluding the treaty. ... Clearly, a people who were experiencing the setting-up of false, puppet chiefs and social granulation ... cannot be believed to be controlling its own membership. [65]

The right, then, would not only have to be demonstrated to exist at the time of colonisation, but would have to have survived colonisation. This argument may yet be made, but, despite the plaintiffs' argument that the Indian Acts were constructed to incorporate indigenous practice of this right, their evidence was not compelling. The Federal Court at trial dismissed the plaintiffs' claim that sections 8 to 14.3 of the Indian Act 1985 are inconsistent with section 35 of the 1982 Constitution, along with their claim that imposition of members amounted to an infringement on their section 2(d) Charter rights of freedom of association. The plaintiffs are appealing, and the case is now making its way to the Federal Court of Appeal, (next date June 1997, in Edmonton) and will almost certainly proceed to the Supreme Court of Canada.

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[64] Plaintiffs' "Amended Statement of Claim", January 15, 1986; amended April 14, 1986, and November 17, 1986, in Twinn et. al v. Canada (Federal Court - Trial). Hereafter Plaintiffs' "Amended Statement of Claim".

[65] Twinn unedited manuscript at 71-72.

"The question of who should live on our reserve is really a matter that should be decided by us as people who own and live on the land", said Mrs. Sophie Makinaw, a witness for the appellants.[66] But who is "us as people", when the excluded also claim to be part of the "us"? Who decides, and on what criteria, and with what accountability?

Reasons cited for band decisions to exclude C-31 reinstatees include unfamiliarity with culture, and limitation of financial resources, housing and land,[67] but upon examination the reasons begin to look suspiciously like sexism and, in the case of 'half-breed' children, like racism. Bands, after all, cannot and do not now provide residences or services for all current members. Existing members do not have to take any cultural means test nor be examined for racial purity. While some codes, for example, the Blood Tribe's, provide for cultural criteria for membership, they do not have in place transparent, consistent and impartial testing mechanisms, and Chief and Council invoke the criteria selectively when justifying exclusion.[68]

c. The Federal Court (Trial) Decision

In Sawridge, the plaintiffs had asserted existing aboriginal and treaty rights under Section 35 to control citizenship, and to do so in ways that discriminated against at least some women. The court disagreed emphatically with this construction, deciding rather that the Constitution requires the exercise of existing aboriginal and treaty rights to be consistent with gender equality provisions.

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[66] Plaintiffs' "Amended Statement of Claim", oral answer translated by Harold Cardinal.

[67] Ibid.

[68] For example, in terminating my (acquired) Blood Tribe membership, Chief and Council cited my lack of aboriginal heritage and my unfamiliarity with Blackfoot language or culture. The first claim is untrue, and the second is untested; there is apprently no testing procedure established by the Blood government. A cynic might be forgiven for thinking the termination had more to do with my divorce from a prominent Blood politician than with ethnic descent purity or cultural integrity.

Justice Muldoon decided that the effect of provisions of the Constitution on custom were to extinguish it to the extent of its incompatibility with gender equality provisions of the Charter, through the operation of section 35(4)[69] of the Constitution Act 1982. "The plaintiffs are firmly caught by the provisions of section 35 of the Constitution Act which they themselves invoke. The more firmly the plaintiffs bring themselves into and under subsection 35(1) the more surely subsection 35(4) acts upon their alleged rights pursuant to subsection 35(1) which, therefore are modified so as to be guaranteed equally to the whole collectivity of Indian men and Indian women." Muldoon then decided that subsection 35(4) of the Constitution Act 1982 functions to extinguish any aboriginal or treaty right to discriminate. The effect is to guarantee "equality of rights between male and female persons, no matter what rights or responsibilities may have pertained in earlier times" and it "speaks deliberately and specifically to the diminution of past inequalities between Indian men and women".[70] The effect of this decision, pending the June 1997 appeal, is to make it a matter of law that internal discrimination by aboriginal communities is unconstitutional.

Defining Contemporary Citizenship

The citizenship of modernity has been the primary legal relationship of individuals with the state, in which the former are viewed as members of the latter and as having some political role in the latter, and to whom the latter owes some minimal obligations, generally articulated as citizen rights. (These are often coterminous with human rights, to which all human beings are entitled regardless of state affiliation.) Citizenship is exclusive to the members of the collectivity recognised as citizens by the state. It depends upon boundaries, membership criteria, and admission and exit formulae. Membership, as they say, has its privileges.

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[69] 35(4) "Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

[70] Muldoon J., ibid at 31-32.

The different ways in which citizens cohere within the state, and the different mechanisms, structural, historical and otherwise, through which this citizenship is mediated, suggest that differentiated citizenship is normal. Indeed, failure to acknowledge profound identity and rights collectivities within the state leads to confrontation with the state when it seeks to impose a universal undifferentiated citizenship. At the same time, the purpose of citizenship is to identify 'us' from 'them' in the global arena, and within states, as regards state obligations to citizens (as differentiated from non-citizens).

Western liberalism has constructed theories of citizenship that assume homogeneous populations, even where this was not the case. This homogeneous construction of an apparently ungendered, unconflicted citizen is not precise in describing the increasingly complex and textured natures of citizen populations and in the primary ways segments of these populations address themselves to the nation-state in the practice of politics.

The contemporary notion of citizen is inextricably tied to the historical evolution of the state. Increasingly, the label 'nation-state', with its imputation of the congruence between ethnic, cultural and historical nationalism with the contemporary organising and articulating form of the state, is inaccurate. Particularly for multi-ethnic states and those created by the historical practices of colonialism, it is more accurate to describe them as 'nations-state' entities. That is, increasingly states are complex multi-national units, whose diverse populations have different histories and consciousnesses. Further, several states share fragments of nations, whose shared historico-cultural bonds precede and transcend state borders. For example, Canada's southern border with the United States bisects the Kootenay, Blackfoot and Mohawk nations, to name just three. The same states' border between Yukon and Alaska bisects the Tlingit nation, as well as the Porcupine cariboo herd upon which the Yukon Old Crow Gwich'in depend. The Canada-Greenland borders are oblivious to their division of Inuit peoples.

The globalisation of neoliberalism and the consolidation of western technology and culture as 'progress', together with the West's dominance of market and military forces, have eroded the state and indeed may be rendering it obsolete, but globalisation of information and ideas has also led to international solidarities and strategies. This is true especially of demands for democratic political forms, and of resistance to oppression, commodification, environmental degradation, metropole-periphery relationships, and so on.[71] Politics has gone local and supra-national, and with this phenomenon, the notion of citizenship is expanded. Indeed, feminist, ecological, anti-poverty, peace, labour, and human rights movements have contributed to democratisation, which of course reinforces the practice of citizenship as well as the consolidation of international solidarities.[72]

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[71] See, for example, Yoshikazu Sakamoto, "Democratization, Social Movements and World Order", International Political Economy: Understanding Global Disorder (Bjorn Hettne, ed.), Fernwood Publishing, Halifax, Nova Scotia, 1995.

[72] Ibid at 140.

Citizenship is further textured by the increasing self-consciousness of aspatial extra-national politically potent and rights-bearing movements. It is refined by gender together with feminist consciousness, by cultural identity, by language, by rights consciousness as workers, citizens, environmental advocates, and so on. Such collective consciousness mediates the notion of citizenship through the experiential reality of individual location in the state with its implicit gendered, ethnic, class and other dominant privileges and trans-state political solidarities.

The inclusion of difference moves us from the notion of 'ungendered' homogeneous citizenship as an unequivocal relationship with the state, to a focus on what engaging in that relationship means. To fully engage, citizens must be able 'to be'. Affirming difference, even difference as a locus of rights and claims as part of aboriginal entitlement, becomes part of the actualised citizen. The relationship with the state becomes textured as citizens, differently situated in relation to the state and to each other, increasingly contest the nature of that state and its role in maintaining or changing relations of dominance. In this process, the dominant discourses of modern citizenship are contested, to the extent that they are "predicated on systemic exclusions of those who are othered by these discourses".[73]

Identity and Difference

Rights theory has assumed that protection of individuals' rights creates the conditions for the expression of group identity, which then needs no further protection.[74] The United

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[73] Anna Yeatman, "Minorities and the Politics of Difference", Postmodern Revisionings of the Political, Routledge, New York, 1994, at 86.

[74] Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights, Clarendon Press, Oxford, 1995, at 3.

Nations reflects these assumptions in the Universal Declaration of Human Rights.[75] Subsequent history suggests that "minority rights cannot be subsumed under the category of human rights"[76] and the international community more recently has struggled with protecting minority rights (the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1993); the Draft Universal Declaration on Indigenous Rights (1988).)

"Identity politics", or the "politics of difference", as they are sometimes called, have focused on the significance of differences among citizens. The difference of history, geography, skin colour, ethnic origin, class, sexuality, ability, gender and power relations is argued by some to be both politically salient and contestable. Identity politics is especially potent in articulating the primacy of cultural integrity in mediating citizenship and in resisting the impetus toward cultural homogenisation through the powerful impulses and instruments of western modernity. At the same time as distinctions among citizens are being examined for their political consequences, a counter-discourse argues that the difference difference makes is private, neutral in construction of the universality of citizenship; and dominating when brought into public policy.[77]

Still others, such as Metisse Emma LaRoque, express concern that the differences of history, culture and power relations must not be essentialised in ways that ossify social and political institutions, nor in ways that justify oppression and erode the citizenship package of rights and duties because of the cultural significance or instrumentality for existing elites of just such behaviour. The problem of oppression of 'internal minorities' has attracted a fair amount of attention,[78] not without reason. In relation to aboriginal governance, LaRocque warns that selective 'traditions' are too often interpreted "in the service of political interests", becoming "fundamentalist and ideological, leading to alienation, if not persecution, of valuable members" in a fashion contrary to the pre-colonial indigenous preference for "freedom, democracy, justice and gender inclusivity".[79]

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[75] Ibid.

[76] Ibid at 4.

[77] See, for example, Katherine Fierlbeck, "The Ambivalent Potential of Cultural Identity", Canadian Journal of Political Science XXIX, March 1996.

Within cultures and states, boundary maintenance determines who is and who is not a member. Others are differentiated by social and legal means. Exclusion, then, is implied in citizenship criteria. Those who are citizens are identified as part of the 'we' community. Still, there are distinctions within the 'we' community between those whose ability to engage in community life because of limited ability or social stigmata, and those who are normative, neutral, and undifferentiated on grounds that impair citizenship. Implicit in this is the assumption that those who are 'other' are impaired citizens because they are "incapable of transcending their particular life circumstances to realize the general will".[80] Linda Trimble confronts this assumption about what a 'good enough citizen' is, and how several categories of Canadians are apparently not good enough citizens.[81] Minorities, especially minorities distinguished by skin colour, are, by virtue of social construction, deviant from the "assimilationist ideal", which is a natural consequence of the "systematic exclusions of those who are othered" by the "dominant discourses of modern citizenship".[82] Now, those who have been 'othered' are contesting the dominant discourses, notably with the emergent theorisation of differential citizenship.[83] This takes the position that difference from the norm is not a priori an impairment of citizenship, but rather that it must be taken into account in both the theorisation and practice of citizens. At least some kinds of difference, then, are simply different entry points to citizenship; lenses that reveal different vistas, but no less valid than the dominant expression. Indeed, consideration of this difference is essential in order to have engaged and contextualised citizens.[84] Difference, which is fundamental to identity, becomes a defining part of one's citizenship capacity.

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[78] Leslie Green, "Internal Minorities and Their Rights", Group Rights (Judith Baker, ed.), University of Toronto Press, 1994, at 101; Katherine Fierlbeck, "The Ambivalent Potential of Cultural Identity", Canadian Journal of Political Science XXIX, March 1996, at 21; Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights, Clarendon Press, Oxford, 1995, 7-8.

[79] Emma LaRocque, "Relationship of Gender to Issues of Self-Government", unpublished paper, Department of Native Studies, University of Manitoba, 1996, at 30.

[80] Janine Brodie, "Gender, the New Citizenship and the Neo-Liberal State", unpublished, Public Lecture at the University of Western Ontario, 1995, at 4.

But difference is not immutable. Edward Said, for example, argues that "'identity' does not necessarily imply ontologically given and eternally determined stability, or uniqueness, or irreducible character, or privileged status as something total and complete in and of itself" [85] That is, "identity" cannot be taken to be sacrosanct, to be beyond critique or contestation, nor to be reified past the possibility of change. Such conceptions of identity are conservative, dependent on unalterable categorisation of individuals and of society; they contain the potential for racism dignified as authentic membership, and for oppression of those who do not or cannot conform to categories imposed upon them. The preservation of society, of culture, of difference, while not unproblematic, is generally viewed as a legitimate and worthwhile objective. After all, we are all contextualised by family, community, culture, language, custom -- that is, by structured relationships and the forms through which they are expressed and interpreted. But reduction to a racially defined membership denies the reality that these are socialised relationships and cultural interpretations, not genetic ones. In Said's words,

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[81] Linda Trimble, "Good Enough Citizens", Unpublished paper presented to the Canadian Political Science Association, Brock University, June 4, 1996.

[82] Anna Yeatman, "Minorities and the Politics of Difference", Postmodern Revisionings of the Political, Routledge, New York, 1994, at 86.

[83] For example, Iris Marion Young, Will Kymlicka, Charles Taylor, Anna Yeatman.

[84] Linda Trimble, "Beyond Gloom and Doom".

[85] Edward W. Said, Culture and Imperialism, Random House, New York, 1994, at 315.

> No one can deny the persisting continuities of long traditions, sustained habitations, national languages, and cultural geographies, but there seems no reason except fear and prejudice to keep insisting on their separation and distinctiveness, as if that was all human life was about.[86]

Tradition itself is ambiguous terrain for political resistance to homogenisation, westernisation, and colonisation. For example, Gerald Alfred argues that for indigenous nations, identity, coherence and continuity are encoded in "traditional forms of social organization" -- within traditions.[87] On this view, traditional practices are essential for cultural viability in the face of the weight of colonial culture and politics. But Emma LaRocque argues that "much of what is unquestionably thought to be tradition is actually syncretized fragments of Native and white traditions which have become highly politicized because they have been created from the context of colonization".[88] The exclusion of women who marry 'out' is an example of this sort of internalisation of colonial values, in this case, the values of European patriarchal social organisation. And, while Alfred's view does not rule out change in traditions, it does not examine how this occurs, and who participates. Continuing with the example of Indian women who "marry out', Alfred's view does not explain why these women should not participate in the debate about the justice or necessity of their situation. They are involuntarily exited, and then are by definition no longer part of the group discussing the matter, and so have no legitimate voice. Finally, Alfred's view is silent on the question of contested traditions, most notably practices which legitimate gender oppression. These are outside the norms of international human rights law, and are morally repugnant. As Kymlicka[89] argues, "An adequate theory of the rights of cultural minorities must therefore be compatible with the just demands of disadvantaged social groups".[90]

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[86] Edward W. Said, Culture and Imperialism, Random House, New York, 1994, at 336.

[87] Gerald R. Alfred, Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism, Oxford University Press, 1995, at 12.

Edward Said argues for the significance of tradition, without removing it from critique or from history. For Said, identity labels are fluid and located in time and in historical context, marked with all of the experience of history. Tradition is cumulative and continuous, amenable to change and adaptation, and not reliant only on "things of the past".[91] Imperialism extends its reach in the culturally embedded consequences of its prior existence in what Said calls the consolidation of "cultures and identities on a global scale".[92]

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[88] Emma LaRocque, "Relationship of Gender to Issues of Self-Government", at 3.

[89] Kymlicka rejects as as morally repugnant any claim that vests a right in a minority to oppress internally. Multicultural Citizenship, at 8.

[90] Ibid at 19.

[91] Emma LaRocque, "Relationship of Gender to Issues of Self-Government", at 27.

Nor are different communities, minorities, inalterable from the majority or from change. "Hybridity"[93] refers to the growing number of cultural and ethnic combinations that characterise contemporary societies. As Said put it, "No one today is purely one thing."[94] This bears on the problem of descent-based membership criteria. For Said, the exaltation of culture and ethnic lineage is fundamentally conservative, and represents the inability of a society to bring all of its history to bear on the present. It contains the ingredients of official racism. It denies the possibility and more problematically the reality of hybridity. It heralds the rise of "nativism", the acceptance of the consequences of "the racial, religious, and political divisions imposed by imperialism",[95] which leads to the trap of essentialism and reaction to the cultural narrative of the coloniser, rather than to seek a contextualised decolonisation. This results in indigenous social formations "falling prey to colonial parameters".[96]

And perhaps that is what LaRocque had in mind when she suggested aboriginal peoples have fallen into a colonial trap in positing incommensurability between aboriginal and colonial peoples and cultures.[97] Initially "othered" by the colonial power to legitimate its seizure of aboriginal land and enforced hegemony over aboriginal nations, that same "other-ness" is now invoked to claim rights grounded in cultural difference, rather than on the basis of pre-existing aboriginal inherency or human rights.

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[92] Edward W. Said, Culture and Imperialism, at 336.

[93] Ibid.

[94] Ibid.

[95] Ibid at 228.

[96] Emma LaRocque, "Relationship of Gender to Issues of Self-Government", at 20.

[97] Ibid, at 19-20.

Membership or Citizenship?

While much ink has been spilled on the question of indigenous governance as a right pre-existing or conterminous with the right of existence of the state, less has been spent on citizenship relations of indigenous people to indigenous political entities and to the encompassing state and the relationship between the two governments. Will indigenous peoples hold citizenship, as the term is understood, in indigenous nations, or will they hold membership in communities that are themselves located as well as incorporated within the political structural apparatus of the state? Will indigenous persons hold state citizenship together with, or superimposed on indigenous citizenship or membership? And in the contestation about membership inclusion and involuntary exit, to which arbitration mechanism, and which rights structure, may indigenous persons apply? When membership codes are constituted so as to systematically exclude categories of indigenous persons on grounds which prima facie are prohibited by the Charter, are they nevertheless operative as an exercise of rights which are necessarily distinguished from states' rights codes, or are there universal ethical standards with which indigenous governments must comply? Put another way, may indigenous political difference, expressed further to section 35 rights, violate fundamental human rights of indigenous persons; and if so, must it meet some test of defensibility?

Citizenship is a "global phenomenon" shared by diverse cultures and states with diverse histories, engaged in inequitable power relations internally and with each other. It is no longer culture specific nor does it fit within culturally-specific theory.[98] It is a fundamental and universal human right[illegible] stateless persons are the subject of international concern. Indeed, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights guarantee rights and freedoms equally to all persons, regardless of distinctions, and frame these rights as guaranteed by States Parties in these foundations of international rights laws. The documents are permeated by the assumption that all persons are citizens of some state, and exercise their rights and freedoms within the context of a state.

The Royal Commission on Aboriginal Peoples (RCAP) argues that Section 35 aboriginal rights are collective rights held by political units. Section 35 essentially affirms aboriginal peoples as founding peoples and as political, not racial groups; as "historically defined political units, which often have mixed compositions and include individuals of varied racial origins" [100] Citizenship, in the view of the RCAP, can be based on "parentage, continuing affiliation, self-identification, adoptive status, (or) residence" but "it cannot legitimately depend on genetic characteristics as such". [101]

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[98] Nira Yuval-Davis, "The Citizenship Debate: Women, Ethnic Processes and the State", in Feminist Review, No.39, 1991, at 66-67.

[99] Article 15 of the Universal Declaration of Human Rights declares that (1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality. Note that within the meaning of the Declaration 'nationality' means membership in the political construct of the state, not in the socio-cultural construct of 'nation'.

[100] Royal Commission on Aboriginal Peoples, Partners in Confederation, Minister of Supply and Services Canada, Ottawa, 1993, 29-30.

RCAP views determination of members (what some bands call citizenship) as a "precondition for the exercise of self-governmental rights". This determination is made by "the group", "subject to basic norms of fairness and applicable constitutional and international standards".[102] However, this fails to address the realpolitik, where the group is defined so as to eliminate the very persons who seek membership and are frustrated in their search. In a cruel tautology, the group decides. However, a class of people are involuntarily excluded from the group; therefore they are not part of the group and cannot participate in decision-making nor in contestation. And, there is fuzzy thinking on the term 'citizenship' which is used coterminously with 'membership'. If the right of governance is within Canada as recommended by RCAP, then the over-arching citizenship of the state applies: Canadian citizenship. Other affiliations may be important, but they cannot be constructed as citizenship. If, however, membership is citizenship, then there is the problem of parallel and conflicting citizenship loyalty and identity.

The Draft Declaration on the Rights of Indigenous Peoples asserts a right to determine citizenship in accordance with custom and tradition; this citizenship is not intended to impair the concurrent citizenship in the state.[103] This, however, must be read together with the rest of the Draft Declaration. For example, Article 1 invokes all internationally recognised human rights and fundamental freedoms for indigenous peoples, and this assuredly includes protection from sex discrimination and racism. Article 8 says that indigenous peoples have the collective and individual right to identity. Article 9 specifies that "Indigenous peoples and individuals" have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned." Clearly, different readings of these provisions will suggest different outcomes. Traditions and customs are not neutral in terms of perpetuating power relations. Women in many different cultures contest tradition and cultural practices because they are the instruments and the practices of women's subordination. As Emma LaRoque put it, "oppression with Native communities is not equally placed".[104] Nor can indigenous nations or communities invoke a right to be exempted from international standards of human rights. The standards of conduct of the human community are now the 'normative ought' regardless of cultural location or traditional dislocation. And, as discussed in Chapter Four, the bulk of international law requires Canada to ensure compliance with international prohibition of sex discrimination, even where it is cloaked in tradition.

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[101] Ibid at 30.

[102] Ibid at 44.

[103] Draft Declaration on the Rights of Indigenous Peoples, Article 32. U.N. Doc. E/CN.4/Sub.2/1993/29/Annex 1.

Indigenous communities will claim a right to control citizenship, but it seems most likely this citizenship will not derogate from the concurrent exercise of Canadian citizenship.[105] International law, after all, is also dedicated to and implemented by states. This preserves not only the rights of Canadian citizenship for indigenous peoples in Canada, but reinforces the over-arching sovereignty of the state against indigenous and other liberation movements that would replace the state.

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[104] Emma LaRocque, "Relationship of Gender to Issues of Self-Government", at 24.

[105] For example, Brian Slattery argues that individual aboriginals are citizens of Canada, with Charter rights. "First Nations and the Constitution: A Question of Trust", Canadian Bar Review, Vol.71, June 1992, at 286.

It seems apparent that indigenous women and their children have a right to self-identify, and to be members of their cultural collectivity. Membership is socially and politically potent: women and possibly "mixed-race" persons cannot be deprived of identity or of indigenous citizenship. The way in which 'tradition' will factor into this remains to be seen, and continues to be a potential inconsistency, without reference to a test for privileging tradition *qua* tradition, regardless of its derogation from the fundamental rights and freedoms embodied in international law. The issue of descent-based, that is, 'racial' criteria for membership has not been clearly addressed yet, but it seems unlikely to be defensible as an *a priori* condition.

It should be repeated here that the Charter is grounded in international law, and reflects much of Canada's international obligations to rights and freedoms. Those who wish to exempt indigenous governments from the Charter will have to make a compelling case, both in regard to the illegitimacy of the state which now contains them, and in regard to the need for exemption in order to assure authentic indigenous cultural survival. To date, this argument has been less than crystal clear, and often conflated with justificatory arguments designed to preserve policy measures already taken, which certainly abrogate Charter and international rights and freedoms.

The Draft Declaration is silent on the provisions for involuntary exit of indigenous persons. However, there is an internationally recognized fundamental human right of persons to citizenship, to nationality. It is unclear whether this will translate into a concurrent right of indigenous persons to affiliation with their community of origin.

Conclusion

For aboriginal women who have been involuntarily exited from their communities, or who live with the knowledge that their partnership choices are circumscribed by this consequence, and for the children of these women, citizenship is a less than full package. It is a damaged relationship with the federal government, and with emerging indigenous governments. It is a relationship characterised by marginality from the dominant norm, and de facto exclusion from the protection of the Charter guarantees of sex equality. This relationship, which is primarily with the state, is damaged by the federal government's non-intervention in exclusionary, discriminatory band membership codes, and by its invocation of its respect for band membership codes as an incident of self-government. These women, then, are largely abandoned by the state when they attempt to invoke the protection which the state has devised precisely to protect citizen-government relations. Thus, Canadian citizenship has been eroded by federal policy and practices. In liberal philosophical and political terms, the state has failed these women.

At the same time, these women, who place "the highest value on 'belonging' again to their community",[106] whose primary identity is indigenous, as members of bands or nations, are denied membership or citizenship in the relevant band. Their primary indigenous identity may be personal, but it may not be practised in community, and it will not have a political and social context. This is exactly contrary to international human rights law standards and to what is at the core of much of indigenous activism -- the right to remain culturally and politically authentic. It is a right that is dependent on community for its exercise. These women, then, are denied membership/citizenship by indigenous governments as well. They are involuntarily exited from a community that refuses to accept them, to a community that refuses to 'see' them in their historical, social and political context and that refuses to guarantee their fundamental rights. Here, the theorists of difference have no satisfactory explanation or justification for the denial of politically significant authenticity to these women. Nor do they satisfactorily account for the internalisation of colonial norms within indigenous governments, nor for their discomfort with critiquing what are clearly violations of human rights. Finally, those native and non-native scholars and activists who support indigenous efforts at decolonisation have no satisfactory explanation of why the international, universal norms of ethical government behaviour should not apply to indigenous governments.

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[106] Sally Weaver, "First Nations Women and Government Policy", at 125.

Twice betrayed, these women and their children hold ambiguous citizenship as relationship with the state, and are denied it in their communities of origin. The state finds it expedient to ignore this casualty of its historical colonial interference, preferring to hide behind the rhetoric of its support for self government, in which these women are invisible and unheard. Indigenous governments, some of which bear a remarkable resemblance to colonial models, too often invoke tradition to deflect critique of sexist, racist practices. In the process, political contestation is constructed as un- or anti-aboriginal, feminist consciousness is denigrated as alien and divisive, racial descent criteria are conflated with cultural preservation, and self-serving tautologies pass as the theoretical foundation for decolonisation.

Conclusion
So What's An Exited Indian Woman To Do?

So what's an exited Indian woman to do? Law, democratic mainstream politics, and indigenous politics seem unable or unwilling to confront the issues. Denied status, and with it, access to federal and band programs, meaningful exercise of aboriginal and treaty rights, and perhaps most importantly, denied the right to practice identity by living in community, the affected women and their children are exiled to the dominant society. The dominant society, imbued with the dominant mythology, refuses to see Indians in context. Colonial oppression is denied, while the grudging acknowledgement of aboriginal and treaty rights is mitigated by law and politics. Nor will the state apply its recent and emerging view of rights in a way that works to the advantage of these women. Rather, the state retreats behind its self-serving rhetoric of respect for 'self' government. Meanwhile, band governments claim to be governments of First Nations, practising a constitutionally recognised aboriginal and treaty right which includes control of membership or citizenship. Many of these refuse to embrace exited women and their children, too often invoking sexist practices as constitutionally protected 'tradition'. In sum, neither the state nor band governments are willing to serve these women's interests. Neither will defend them under rights discourse, though both use rights discourse when it suits them. Neither will affirm their value as human resources to society. Neither will affirm their citizenship by taking the steps to permit these women to live in a way that honours their identity and values their participation. They are truly abandoned.

Democracy fails these women. Premised on majority rule, and with no mechanisms built in other than minority, aboriginal and gender rights protections, it is constructed to dominate those who cannot effectively mount a rights claim against the state. Premised on the theoretical cultural- and gender-neutral citizen and politician, it is unable to ensure representation of these women's particularity in a political system also premised on their sex and ethnic inferiority.

Nor is the arbitration of conflict by the judiciary without its perils and its costs. The state's government and its courts are uncertain allies for aboriginal peoples and other marginalised groups seeking a measure of justice.[1] Law fails these women, even with rights discourse foregrounded. The Lavell case is infamous for dignifying sex discrimination as non-discrimination in law. The Sawridge case seeks to define Indian women's sexual equality rights out of existence. Even if the best elements of Justice Muldoon's problematic decision are upheld through the appeals process, there is a danger that the worst elements will accompany it. As discussed in Chapter Three, at a minimum these include denial of contemporary aboriginal cultural practices' authenticity, denial of indigenous sovereignty vis-a-vis the Canadian state, and continuing valorisation of colonial mythology's appropriation of indigenous lands and sovereignty. Lawmakers, then, fail to see that any law affirming these women's rights must affirm them in their specificity -- as indigenous women, part of colonised societies, to whom the state is a real oppressor and only potentially an ally.

The Indian Acts were designed as administrative regulations for a federal bureaucracy, not to embody a set of international obligations. These administrative arrangements were patterned on the mode of social and bureaucratic organisation normative for the colonising elite who implemented them. The 'membership' provisions of the Indian Acts to 1985 were consistent with and reflective of British patriarchal norms, in which women and children were historically male property and to indicate this, took the status of and the surname designation of the male head of the household.[2] This is the tradition the Indian Act incorporated, notwithstanding revisionist efforts of some bands to construct the

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[1] See John Borrows for a partial discussion of some of the most recent Supreme Court of Canada decisions that arguably undermine aboriginal rights. "The Trickster".

[2] Joyce Green, "Sexual Equality and Indian Government: An Analysis of Bill C-31 Amendments to the Indian Act", Native Studies Review Vol.1, No.2, 1985, and "Constitutionalising the Patriarchy", Constitutional Forum 4,4, 1992; Sally Weaver, "First Nations Women and Government Policy, 1970-92: Discrimination and Conflict", Changing Patterns: Women in Canada (2nd) (Sandra Burt, Lorraine Code, and Lindsay Dorney, eds.), McClelland and Stewart, Inc., Toronto, 1993.

Indian Act membership provisions as federal acknowledgement of aboriginal tradition.[3] Contemporary exited women and their children suffer from consequences of the sexist membership provisions of the Indian Act, passed by the unrepresentative lawmakers for the Canadian state and implemented by its bureaucracy as part of its policy of assimilation. They also suffer from racism and sexism in indigenous communities, who have both incorporated colonial impulses in this regard, and, despite the efforts of other revisionists,[4] at least some of whom had indigenous expressions of them.

In 1985 the federal government legislated changes to the Indian Act to remove sex discrimination in the membership provisions, and save the legislation from challenge under the Charter's equality provisions. The C-31 amendments were a partial remedy to what was in domestic and international law a grievous affront by Canada to the political, social and legal equality rights of Indian women. The remedy was not accompanied by the fiscal, programmatic and other forms of support bands would need for a sudden substantial population influx. The combination of decades of imposition of the Indian Act and the financial straits in which most bands find themselves resulted in widespread rejection by bands of C-31 and of reinstated women and children. While the fiscal and political strain of these changes is keenly felt by many bands, it is hardly a concern for the Sawridge Band, one of Canada's wealthiest. As evidence in Sawridge shows, it is effectively run as an exclusive limited shareholder corporation, designed to preserve that exclusivity, not to preserve cultural integrity.[5] The arguments in Sawridge advancing aboriginal and treaty rights affirmed by culture and tradition are suspect because they are so clearly a cover for the main agenda of defending the wealth, power and privilege of the plaintiffs, who have otherwise demonstrated little concern with advancing culture.

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[3] The plaintiff made this argument in testimony in Sawridge v. Canada (FCT) (1995).

[4] For example, Mary Ellen Turpel-Lafond treats patriarchy and violence against women as purely colonial imports. "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women", Women and the Canadian State, Caroline Andrew and Sanda Rodgers, eds., McGill-Queen's University Press, 1997, at 70. Hereafter "Patriarchy and Paternalism".

It is only through organising as indigenous women struggling for indigenous women's rights, and through alliances with other women and other supportive organisations, that exited Indian women have had any measure of success.[6] Yet even in this enterprise they are subject to derision and delegitimation by other indigenous people, who insist on constructing: feminist analysis as un-indigenous; indigenous cultures as unoppressive to women; indigenous men as equally victimised by colonialism and therefore as equally needing healing and certainly not critique; women's legal and cultural emancipation as destructive to indigenous decolonisation; and political solutions that employ rights discourse as illegitimate.

As Wendy Moss writes, "it still appears acceptable, in the current policy environment, to sacrifice the equality rights of a certain segment of the First Nations women population in deference to Indian self-government rights not yet fully recognized by the government itself."[7] This is as true for many band governments as it is for the Canadian government. This is why Mary Ellen Turpel-Lafond can insist that indigenous women do not focus on the western notion of equality, identifying rather with liberation as indigenous people, despite the clear evidence to the contrary from indigenous women who have struggled for equality rights for years so that they might be part of the indigenous community struggling for decolonisation.[8] This struggle has been for inclusion in their communities, from the legal and political limbo imposed by patriarchal, racist Canadian governments and increasingly, by patriarchal, racist band governments.[9] Teressa Anne Nahanee celebrates women's Charter-recognised equality rights for benefitting Indian women.[10] She is not alone in taking this view. As Wendy Moss writes, "many indigenous women do not want to sacrifice their sex-equality rights for a self-government that is not yet fully realized or recognized".[11]

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[5] Although this view is rejected by Senator and Sawridge Chief Walter Twinn. However, in the same interview, Twinn compared the Sawridge Band to the Reichmann family facing a takeover that would ruin the business. David Howell, "Native leaders cheer ruling judge was biased", The Edmonton Journal, June 6, 1997, A3.

[6] This history is documented in Teressa Anne Nahanee, "Indian Women, Sex Equality, and the Charter", Women and the Canadian State, Caroline Andrew and Sanda Rodgers, eds., McGill-Queen's University Press, 1997, at 95-100. Hereafter "Indian Women, Sex Equality, and the Charter". The organisation and Ottawa march of primarily Tobique women is documented in Janet Silman, Enough is Enough: Aboriginal Women Speak Out, The Women's Press, Toronto, 1987.

Justice is elusive. Women and aboriginal peoples, monolithically defined, might define for themselves a path to justice that men and settler peoples, monolithically defined, could support. However, social categories are not so precise. Some aboriginal peoples are less well situated, for reasons of history and hypersubordination, relative to others. Women who have lost 'status' or been denied its socio-political power as a consequence of imposed or internalised Indian Act provisions are denied recognition as part of the group defining justice. The first injustice of racialised, sexist exclusion is now perpetuated, while the settler community is invited to ignore this injustice because of its complicity in the general injustice of colonialism. The internalised pathologies of sexism and racism in aboriginal communities have been made manifest in virulent antipathy towards community incorporation of these women and their often "racially"[12] mixed children.

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[7] Wendy Moss, "The Canadian State and Indian Women: The Struggle for Sex Equality Under the Indian Act", Women and the Canadian State, Caroline Andrew and Sanda Rodgers, eds., McGill-Queen's University Press, 1997, at 87. Hereafter "The Canadian State and Indian Women".

[8] "Patriarchy and Paternalism".

[9] "Indian Women, Sex Equality, and the Charter", at 90.

[10] Ibid at 100-102.

[11] "The Canadian State and Indian Women", at 88.

Perhaps justice lies in the search for equity, rather than the more unilateral referent of equality. Equity is more relational, less the measure of deviance from norm. Equity can take into account the different and unequal conditions shaping our opportunities and choices, in order to achieve a substantive equality that does not obliterate or deny difference. Differences must be understood in relation to each other, rather than in relation to an invisible and privileged white male norm. Only then will there be genuine commitment to projects like decolonisation, to realising indigenous and women's and other rights in practice.

In indigenous communities as in Canada itself and globally, the postmodern proliferation of identity, of difference, of sites of struggle, and of analyses, makes prescription difficult. It is foolish and futile to engage in monolithic construction of Indian,

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[12] All human beings are members of one race. The notion of racial miscegenation is a false one, a racist one, designed to construct some people as other and as inferior. However, this is not to argue that the practices that flow from belief in racial categories do not exist. Racism is real, though racial categories are not.

Woman, Canadian, and so on. Rather, we search for solidarities, for commonality, both in our resistance to domination and in our search for authentic self-definition. Exited Indian women have found allies in other women's organisations, especially feminist ones. (So have aboriginal lobby organisations, though they do not acknowledge the support that women's organisations have given.) Nor is it surprising that women have stood in solidarity with each other, in their particular struggles for political agency. As the National Association of Women and the Law wrote, "all Canadian women are like Indian women to a degree. In several areas their rights are sacrificed to supposed customs and traditions."[13] The liberation politics of the postmodern, and perhaps eventually of the postcolonial, concern self-determination and solidarity, and always, resistance to domination wherever it may be found, even in the band office.

Tradition is fraught terrain for those resisting colonialism. Traditions are repositories both of cultural knowledge and its power relations. They are not neutral, they are not benign, and they should never be taken to be beyond critique. Particularly as Canada grapples with the challenges to the state implicit in claims of an aboriginal right of self-determination, generally packaged as self-government, questions of the validity, the primacy, and the contestability of traditions in both the dominant Canadian societies and in indigenous societies beg for consideration.

The Constitution of 1982 recognises the existing aboriginal and treaty rights of the aboriginal (Inuit, Indian and Metis) peoples who find themselves within the state of Canada.

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[13] National Association of Women and the Law, "Women's Human Right to Equality: A Promise Unfulfilled", submitted to the Special Joint Committee on the Constitution, November 1980, Ottawa, at page 186.

The Constitution also recognises that English and French communities (ethnic derivation, cultural consistency, and shared history, not linguistic communities) as well as many other communities shaped by immigration make Canada a multicultural macro-society. Even with this admirable affirmation of diversity, though, the Canadian Constitution and certainly, its politics, remain profoundly configured by the power relations of English dominance in the face of and at the expense of indigenous nations and New France. In James Tully's words: "The concepts of the people, popular sovereignty, citizenship, unity, equality, recognition and democracy all tend to presuppose the uniformity of a nation state with a centralised and unitary system of legal and political institutions."[14] And, despite the acknowledgement of citizens' and aboriginal rights, the constitution continues to be the structuring of the state by political and economic elites for the maintenance of the status quo. Nor does this provoke much comment, for the constitution reflects the normative assumptions of most of the Canadian population about what is reasonable and natural.

But it is not only the indigenous-settler relationship that needs redesigning. Power relations between segments of society, between classes, and between men and women need attention as well, and simultaneously. There are issues of violence in the home and community, of poverty, of political and economic marginalisation within Canada and within indigenous communities, which overwhelmingly structure indigenous women's reality. Engagement -- resistance -- in the form of sharing experience, forming solidarities, resisting those who perpetuate and support those conditions, and contesting political space to change these conditions -- leads to conflict. It challenges the status quo. It names victimizers as well as victims: it is not 'no-fault'. It threatens vested power relations. By forming solidarities it exposes the contestation to external scrutiny. The process is painful, but it is healthy and necessary.

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[14] James Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity, Cambridge University Press, 1995, at 9. Hereafter Strange Multiplicity.

Similarly, the past's legacy of patriarchy frames women's struggles for civil and political emancipation. Understanding the contemporary location of women in a gendered society requires understanding society's historical record in that regard. Understanding the problematic issue of control of membership or citizenship as an incident of aboriginal self-determination, and the contributions that colonial regimes have made to women's subordination in aboriginal communities, is part of the intellectual foundation necessary for addressing the questions raised by the Sawridge case.

Indigenous futures will be more international than the recent past suggests. Existence within the contemporary nation-state, insertion in an increasingly fluid, hegemonic global capitalist economic order, and common existence on a shrinking and ecologically unstable planet demand rapidly adaptive behaviours from all of us, especially in the form of solidarities, respectful diversity, and affirmation of fundamental human rights and freedoms. And, in the final analysis, peoples' realities are not so incommensurable that we cannot find common ground for consensus on the common rights and freedoms as human beings.

Ultimately, citizenship is an evolving relationship of individuals within and between states and communities, with allegiance to the state being filtered by the lenses of identity and solidarity experienced within and across states. This view of citizenship moves beyond the western liberal construction of citizen as undifferentiated individual member of a state, with whom the citizen has her relationship and whose activities the collective voting practice of citizens legitimates. Through the lens of experience of indigenous women who identify as indigenous and as Canadian, and sometimes, as feminist, a picture is presented which shows the multiple identities and locations -- the experiential and subjective filters -- which comprise a multi-dimensional web shaping the expression of citizenship.

And at a more practical level, the answer to the question "what's an exited Indian woman to do?" is found in women's history of analysis, organisation and activism. Neither the malestream colonial state nor malestream indigenous lobby organisations and governments priorised aboriginal women's rights to be part of their own communities. Neither valued their political or social capital. Their response has been little and late, and always a reaction to extraordinary pressure from the marginalised women in question. Both have used these women's rights to manipulate the other, as they struggle together over questions of decolonisation. Neither has viewed the affected women as central to decolonisation and nation-building. Each is hypocritical and cynical in their respective defences of tradition/culture and equality rights. While indigenous women and other women use law and politics as best they can, understanding the patriarchal and colonial power embedded in them, the real impulse for equality, liberation and self-determination is found within those who are affected by oppression.

Postscript

In June 1997 and after this dissertation's completion, the plaintiffs in Sawridge successfully appealed the decision of Mr. Justice Francis Muldoon of the Federal Court (Trial), alleging that the judge's remarks raised "a reasonable apprehension of bias". The

Federal Court of Appeal ordered a new trial be held before a different judge. This means that all of the arguments must be heard again, and more importantly for the intervenors, the legal counsel must be retained and paid a second time. Native Council of Canada lawyer Eugene Meehan suggested this would be a "financial and emotional tragedy" for the women involved.[15] The process may well take several years. Yet, the issues raised in this dissertation do not depend on the outcome of the case, as the case simply demonstrates the ongoing contradictions and the lack of political will to redress the political injustices being visited on the affected women and children by the federal government and some band councils. As with justice, citizenship delayed is citizenship denied.

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[15] David Howell, "Judge biased, court rules; retrial ordered", The Edmontn Journal, June 5, 1997, A3.

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